United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

IN THE

United States Court of Appeals

For the District of Columbia Circuit

60

No. 18,263

Local 26, International Brotherhood of Electrical Workers, *Appellant*,

v.

John Penello, *Appellee*.

On Appeal from the United States District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 5 1964

Nathan J Paulson
CLERK

Press of Byron S. Adams, Washington, D. C.

INDEX TO JOINT APPENDIX

	Page
Petition for Injunction Under Section 10(1) of the National Labor Relations Act, as amended	2
Order to Show Cause	9
Motion to Dismiss	11
Affidavit of Bancroft T. Foley, Jr.	11
Affidavit of Robert McAlwee	13
Affidavit of Howard S. Cash	14
Affidavit of James C. McCloskey	17
Supplemental Affidavit of Bancroft T. Foley, Jr.	20
Excerpts from Transcript of Proceedings	27
Order Granting Temporary Injunction	46
Oral Opinion	48
Notice of Appeal	56

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,263

LOCAL 26, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, *Appellant,*

v.

JOHN PENELLO, *Appellee.*

On Appeal from the United States District Court for the District of Columbia

JOINT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 2450-'63

JOHN A. PENELLO, Regional Director of the Fifth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,
707 N. Calvert Street
Baltimore 2, Maryland

Petitioner,

v.

ELECTRICAL WORKERS LOCAL 26, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, *AFL-CIO,* and its Business Representative ROBERT MCALWEE,
1745 K Street, N. W.
Washington, D. C.

Respondents.

Petition for Injunction Under Section 10(l) of the National Labor Relations Act, as Amended

To the Honorable, the Judges of the United States District Court for the District of Columbia:

Comes now John A. Penello, Regional Director of the Fifth Region of the National Labor Relations Board herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(1) of the National Labor Relations Act, as amended (61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(1); herein called the Act), for appropriate injunctive relief pending the final disposition of the matters involved herein pending before the Board on charges alleging, *inter alia,* that Respondents have engaged in, and are engaging in, acts and conduct in violation of Section 8(b)(4)(ii), subparagraph (B), and Section 8(b)(4)(ii), subparagraph (D), of the Act. In support thereof, Petitioner respectfully shows as follows:

1. Petitioner is Regional Director of the Fifth Region of the Board an agency of the United States, and files this petition for and on behalf of the Board.

2. Jurisdiction of this Court is invoked pursuant to Section 10(1) of the Act.

3. (a) On or about September 6, 1963, McCloskey & Co. (herein called McCloskey), pursuant to provisions of the Act, filed a charge with the Board alleging, *inter alia,* that Electrical Workers Local 26, International Brotherhood of Electrical Workers (herein called Respondent Local 26), a labor organization, and its agent Robert McAlwee, have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(b)(4)(ii), subparagraph (D), of the Act. A copy of said charge is attached hereto as Exhibit 1 and made a part hereof.

(b) On or about September 30, 1963, McCloskey, pursuant to provisions of the Act, filed a charge with the Board alleging, *inter alia,* that Respondent Local 26, a labor organization, and its agent Robert McAlwee, have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(b)(4)(ii), subparagraph (B), of the Act. A copy of said charge is attached hereto as Exhibit 2 and made a part hereof.

4. The aforesaid charges were referred to Petitioner as Regional Director of the Fifth Region of the Board.

5. Upon the basis of the following, Petitioner has reasonable cause to believe that said charges are true, insofar as they allege that Respondents have violated Section 8(b)(4)(ii), subparagraph (B), and Section 8(b)(4)(ii), subparagraph (D), of the Act, and that a complaint of the Board based on said charges should issue against Respondents pursuant to Section 10(b) of the Act. More particularly, Petitioner has reasonable cause to believe, and believes, that Respondent Local 26 is a labor organization within the meaning of Section 2(5), 8(b) and 10(1) of the Act, that Respondent Robert McAlwee is an agent of Respondent Local 26 within the meaning of Sections 2(13), 8(b) and 10(1) of the Act, and that said Respondents have engaged in, and are engaging in,

acts and conduct in violation of Section 8(b)(4)(ii), subparagraph (B), and Section 8(b)(4)(ii), subparagraph (D), of the Act, affecting commerce within the meaning of sections 2(6) and (7) of the Act as follows:

(a) Respondent Local 26, an unincorporated association, is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(b) At all times material herein Respondent Robert McAlwee has been business manager of Respondent Local 26.

(c) Respondent Local 26 maintains its principal offices at Washington, District of Columbia, and at all times material herein all of Respondents have been engaged within this judicial district in transacting business and in promoting and protecting the interests of the employee members of Respondent Local 26.

(d) McCloskey is engaged in the contracting business at various locations in the United States, including Washington, D. C., where it is the prime contractor on a $50,000,000 addition to the House of Representatives Office Building.

(e) Foley-Ernst, a joint venture composed of The Howard T. Foley Co. and E. C. Ernst, Inc., both corporations organized under and existing by virtue of the laws of the District of Columbia, is an electrical sub-contractor on the said project. Its contract is valued at $4,500,000. During the past year it has purchased materials valued in excess of $100,000 outside the District of Columbia and has had them shipped directly to the job site of the said project from points outside the District of Columbia.

(f) At no time material herein has Respondent Local 26 been certified by the Board as the collective bargaining representative of any of Foley-Ernst's employees, and at no time material herein has the Board issued an order directing Foley-Ernst to bargain with Respondent Local 26 as the representative of said employees.

(g) At all times material herein Foley-Ernst has assigned the work of installing luminous egg-crate ceiling, hangers, tees, cross tees and wall angles at the said House of Representatives Office Building addition project in Washington, D. C., to its employees who are members of, or represented by, Respondent Local 26 rather than to employees who are members of, or represented by, another labor organization, namely, Sheet Metal Workers Local 102, Sheet Metal Workers International Association, AFL-CIO (herein called Local 102) and who are not members of, or represented by Respondent Local 26.

(h) At all times material herein Local 102 has demanded that Foley-Ernst assign the work referred to in subparagraph (g) above to employees who are members of, or represented by, Local 102 rather than to employees who are members of, or represented by, Respondent Local 26 and who are not members of, or represented by, Local 102. Foley-Ernst has refused to accede to said demand.

(i) On or about July 18, 1963, and on or about August 22, 1963, the National Joint Board for Settlement of Jurisdictional Disputes, Building and Construction Industry, assigned the work referred to in subparagraph (g) above to employees who are members of, or represented by, Local 102 rather than to employees who are members of, or represented by, Respondent Local 26 and who are not members of, or represented by, Local 102.

(j) Notwithstanding the aforesaid, Respondent Local 26 has continued to demand that Foley-Ernst assign the work referred to in subparagraph (g) above to employees who are members of, or represented by Local 102 and who are not members of, or represented by, Respondent Local 26.

(k) In furtherance of its demands set forth in paragraph (j) above, Respondent Local 26, by its agent Respondent Robert McAlwee, on or about August 9, 1963, and on or about August 13, 1963, threatened McCloskey and Foley-Ernst with work stoppages and strikes.

(l) By the acts and conduct set forth in subparagraph (k) above, Respondent Local 26 and Respondent Robert McAlwee have threatened, coerced and restrained McCloskey, Foley-Ernst and other persons engaged in commerce or in industries affecting commerce.

(m) Objects of the acts and conduct of Respondent Local 26 and Respondent Robert McAlwee set forth in subparagraph (k) and (l) above were and are

(1) to force or require McCloskey to cease using, selling, handling, transporting, or otherwise dealing in the products of Foley-Ernst, or to cease doing business with Foley-Ernst; and

(2) to force or require Foley-Ernst to assign the work of installing luminous egg-crate ceiling, hangers, tees, cross tees and wall angles at the House of Representatives Office Building addition project in Washington, D. C., to employees who are members of, or represented by, Respondent Local 26.

6. It may fairly be anticipated that, unless enjoined, Respondents will continue or repeat the acts and conduct set forth in paragraph 5, subparagraphs (j), (k), (l) and (m) above, or similar or like acts and conduct in violation of Section 8(b)(4)(ii), subparagraph (B), and Section 8(b)(4)(ii), subparagraph (D), of the Act. It is therefore essential, appropriate, just and proper, for the purpose of effectuating the policies of the Act, and in accordance with the provisions of Section 10(l) thereof, that pending final disposition of the matters involved herein pending before the Board, Respondents be enjoined and restrained from

the Commission of the acts and conduct above alleged, similar acts and conduct, or repetitions thereof.

Wherefore, Petitioner prays:

1. That the Court issue an order directing Respondents to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining Respondents, their officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them, pending the final disposition of the matters involved herein pending before the Board, from:

(a) Threatening or causing any work stoppage or strike at the House of Representatives Office Building addition project in Washington, D. C., for the object of forcing or requiring McCloskey or any other person engaged in commerce or in an industry affecting commerce to cease using, selling, handling, transporting, or otherwise dealing in the products of Foley-Ernst, or to cease doing business with Foley-Ernst; or for the object of forcing Foley-Enrst to assign the work of installing luminous egg-crate ceiling, hangers, tees, cross tees and wall angles at said project to employees who are members of, or represented by, Respondent Local 26 rather than to employees who are members of or represented by Local 102 and who are not members of, or represented by, Respondent Local 26;

(b) In any manner or by any means, threatening, coercing, or restraining McCloskey, Foley-Ernst, or any other person engaged in commerce or in any industry affecting commerce, where an object is either of the objects set forth in subparagraph (a) above.

2. That upon return of said order to show cause, the Court issue an order enjoining and restraining Respondents in the manner set forth above.

3. That the Court grant such further and other relief as may be just and proper.

Dated at Baltimore, Maryland, this 3rd day of October 1963.

/s/ **John A. Penello**
John A. Pennello,
Regional Director
Fifth Region
National Labor Relations Board

Arnold Ordman,
General Counsel,

Dominick L. Manoli,
Associate General Counsel,

Julius G. Serot,
Assistant General Counsel,

Henry L. Segal
Acting Regional Attorney, Region 5,

/s/ **Benjamin K. Blackburn**
Attorney,

National Labor Relations Board
707 N. Calvert Street, Room 652
Baltimore, Maryland 21202
Phone: 752-8460, Ext. 2100

State of Maryland }
City of Baltimore } ss:

I, John A. Penello, being first duly sworn, depose and say that I am Regional Director of the Fifth Region of the National Labor Relations Board; that I have read the foregoing petition and exhibit and know that contents thereof; that the statements therein made as upon personal knowledge are true and those made as upon information and belief I believe to be true.

/s/ John A. Penello
John A. Penello

Subscribed and sworn to before me this 3rd day of October 1963.

/s/ Robert B. Green
(Seal) *Notary Public*

My Commission Expires Sept. 30, 1967.

Filed Oct. 3, 1963

Order to Show Cause

The petition of John A. Penello, Regional Director of the Fifth Region of the National Labor Relations Board, having been duly filed pursuant to Section 10(1) of the National Labor Relations Act, as amended, praying for issuance of an order directing Respondents Electrical Workers Local 26, International Brotherhood of Electrical Workers, AFL-CIO, and its business representative Robert McAlwee to show cause why an injunction should not issue enjoining and restraining said Respondents from engaging in certain acts and conduct in violation of said Act, pending the final disposition of the matters involved pending before said Board, and good cause appearing therefor,

It Is Ordered that Respondents Electrical Workers Local 26, International Brotherhood of Electrical Workers, AFL-CIO, and its business representative Robert McAlwee appear before this Court, at the United States Courthouse in Washington, D. C., on the 15th day of October, 1963, at
or as soon thereafter as counsel can be heard, and then and there show cause, if any there be, why, pending the final disposition of the matters involved pending before the National Labor Relations Board, Respondents, their officers,

representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them, should not be enjoined and restrained as prayed in said petition; and

IT IS FURTHER ORDERED that service of a copy of this order, together with a copy of the petition and exhibits upon which it is issued, be forthwith made by a United States Marshal upon Respondents Electrical Workers Local 26, International Brotherhood of Electrical Workers, AFL-CIO, and its business representative Robert McAlwee, and upon McCloskey & Co., the Charging Party before said Board, in any manner provided in the Rules of Civil Procedure for the United States District Courts, or by registered mail, and that proof of such service be filed herein.

Done at Washington, D. C. this 3rd day of October, 1963.

/s/ ALEXANDER HOLTZOFF
United States District Judge

A True Copy
Test:
HARRY M. HULL, *Clerk,*

By ANNA M. THOMPSON
Deputy Clerk.

Motion to Dismiss

Comes Now defendant International Brotherhood of Electrical Workers, Local 26, by their attorney, and moves this Honorable Court to dismiss the above-captioned action and states the reasons therefor the following:

(1) the petition fails to state a cause of action;

(2) for such other good and further reasons as shall be set forth at the hearing on the motion herein.

Respectfully submitted,

Van Arkel & Kaiser
1730 K Street, N. W.
Washington, D. C. 20006

By /s/ Ronald Rosenberg
Ronald Rosenberg
Attorney for Defendants

October 23, 1963.

Affidavit of Bancroft T. Foley, Jr.

I, Bancroft T. Foley, Jr. being first duly sworn, do hereby depose and say:

That I am, and at all times hereafter mentioned have been, a duly authorized representative of Foley-Ernst, a joint venture between The Howard P. Foley Company (of which I am, and at all times hereafter mentioned, have been a Vice President) and E. C. Ernst, Inc.;

That said joint venture Foley-Ernst is, and at all times hereafter mentioned has been, electrical subcontractor to McCloskey & Company, the general contractor with respect to the construction project known as the Additional House Office Building in Washington, D. C.

That I make this affidavit for the following purposes: use in the above-captioned proceeding;

That Foley-Ernst has a collective bargaining agreement with Local 26, International Brotherhood of Electrical Workers, AFL-CIO, providing that "all electrical equipment and materials shall be installed by employees covered by this contract";

That Foley-Ernst has no collective bargaining agreement with Local 102, Sheet Metal Workers International Association and none of its employees are represented by Local 102;

That Foley-Ernst has in the past installed luminous egg-crate ceilings in the Washington area. At all times such work was performed by employees represented by Local 26, IBEW;

That by contract with McCloskey & Company, Foley-Ernst has agreed to do electrical work at the said Additional House Office Building;

That Foley-Ernst had assigned the work of installing luminous egg-crate ceilings on the Additional House Office Building to employees represented by Local 26, IBEW, and still desires that such employees perform such work. I believe that performance of such work by anyone other than trained electricians would be more costly to Foley-Ernst;

That I informed the National Labor Relations Board by telegram of September 30, 1963, that Foley-Ernst had assigned the work in question to the electrical workers;

That I have never been threatened by any representative of Local 26 concerning this work, nor to my knowledge has any other individual associated with Foley-Ernst been so threatened by representatives of Local 26.

Bancroft T. Foley, Jr.
Authorized Representative
Foley-Ernst (Joint Venture)

Subscribed and sworn to before me this 23rd day of October, 1963.

Notary Public
(Seal) *District of Colunbia*

Affidavit of Robert McAlwee

Robert McAlwee, being first duly sworn, deposes and says:

1. That he is the Business Agent for Local 26, International Brotherhood of Electrical Workers, AFL-CIO, and is a named Respondent in the above-captioned action.

2. That Local 26 has a collective bargaining agreement with Foley-Ernst, a joint venture.

3. That, pursuant to said collective bargaining agreement, members of Local 26, employed by Foley-Ernst have, among other things, installed luminous egg-crate ceilings at the Additional House Office Building as well as at other projects.

4. That he did not threaten James McCloskey with a work stoppage by electricians at the Additional House Office Building if sheet metal workers were assigned the installation of luminous egg-crate ceilings.

5. That he made no threat of a work stoppage by electricians at the meeting of August 13, 1963.

6. That he never sought to have McClosky & Co. cease doing business with Foley-Ernst. That it would be greatly

to the disadvantage of Local 26 if McCloskey & Co. were to cease doing business with Foley-Ernst since many members of Local 26 would thereby lose their jobs.

7. That he has never made a demand that Foley-Ernst assign the installation of luminous egg-crate ceilings to members of Local 26. Foley-Ernst has at all times assigned such work to Local 26 and has indicated its desire to continue to do so.

8. In my memory, Local 26 has never had a strike against Foley-Ernst or any other contractor since our International Union has followed a no-strike policy.

....

Robert McAlwee

Subscribed and sworn to before me this 24th day of October, 1963.

....

Notary Public
District of Columbia

Affidavit of Howard S. Cash

I, Howard S. Cash, being first duly sworn upon oath deposes and say:

1. That I am Business Banager of the Sheet Metal Workers International Association, Local Union 102, AFL-CIO;

2. That I was present at a meeting on August 13, 1963, at the job site of the Additional House Office Building,

Washington, D. C. The following persons were also present at that meeting:

Alfred F. Yates,
Business Representative of the
Sheet Metal Workers International Association,
Local Union 102, AFL-CIO

William J. Ryan
Project Manager
McCloskey & Company

Bancroft T. Foley, Jr.
Representing Foley-Ernst
Electrical Subcontractor

M. C. McMahon
Project Superintendent for Foley-Ernst

Robert McAlwee
Business Manager
Electrical Workers, Local 26
International Brotherhood of Electrical Workers
AFL-CIO

The purpose of the meeting was to discuss the assignment of the installation of independently hung luminous egg-crate ceiling hanger tees, cross tees and wall angles. This work had been assigned to the Sheet Metal Workers by a decision of the National Joint Board for Settlement of Jurisdictional Disputes Building and Construction Industry, by a letter of decision dated July 20, 1963. Mr. McAlwee raised a question of interpretation of the decision, particularly with reference to the use of the language "independently hung" and he insisted that the ceilings were not independently hung. Affiant took the position that the work should be assigned by Foley-Ernst to the Sheet Metal Workers in accordance with the decision of the National Joint Board.

At that time, Mr. Ryan telephoned Mr. J. C. McCloskey at his office in Philadelphia to discuss this matter. I was present in the room at this time and I also talked by telephone with Mr. J. C. McCloskey and requested that the work be assigned in accordance with the decision of the National Joint Board, dated July 20, 1963. Mr. J. C. McCloskey informed your affiant that it was his position that the decision of the National Joint Board should be complied with and asked to speak with Bancroft T. Foley, Jr., who was also present in the room. Mr. Bancroft T. Foley, Jr. discussed the change in assignment of the work from the electricians to the Sheet Metal Workers at which point Mr. Bancroft T. Foley, Jr. stated that he wished to complete one partially completed room. At this point your affiant again pointed out that the work should be performed in accordance with the assignment made by the National Joint Board and that this change in assignment should be made effective immediately since a considerable period of time had elapsed since the National Joint Board had awarded this work to the Sheet Metal Workers. Your affiant further pointed out that the electricians were continuing to perform this work contrary to the decision of the National Joint Board. At this point Mr. McAlwee stated that if the work assignment was changed from the Electricians to the Sheet Metal Workers, that there would be no Electricians on the job.

At the request of Foley-Ernst, Electrical Subcontractor, the National Joint Board was requested to clarify its decision, dated July 20, 1963, particularly with reference to the language "independently hung." Thereafter, by its letter of August 23, 1963, the National Joint Board clarified its decision of July 20, 1963 by deleting the words "independently hung" and reaffirmed the assignment to the Sheet Metal Workers. Despite this clarification and protests by the Sheet Metal Workers International Association and the Sheet Metal Workers Local Union 102, the work has not yet been assigned to the Sheet Metal Workers.

s/s HOWARD S. CASH
Howard S. Cash

DISTRICT OF COLUMBIA, SS:

Subscribed and sworn to before me this 24th day of October, 1963.

s/s IRENE L. JARVIS
Notary Public

Affidavit of James C. McCloskey

James C. McCloskey, being first duly sworn upon oath deposes and says:

That he is a Vice President of McCloskey & Company, a Delaware corporation, which is the *prime* contractor for the construction of the Additional House Office Building under Contract No. ACho 204 with the Architect of the Capitol, on behalf of the United States Government. That on or about August 14, 1963, he spoke by telephone with Robert McAlwee, defendant herein, who is the business representative of defendant, Electrical Workers Local 26. During that conversation he inquired of Mr. McAlwee as to whether Local 26 would abide by the order of the AFL-CIO, National Joint Board for the Settlement of Jurisdictional Disputes in the construction industry (a copy of said order, dated July 20, 1963, is attached hereto as Exhibit A), which order directed that the installation of luminous egg-crate ceilings, hangers, tees, cross tees and wall angles, in the building, as required by the Construction Contract, be accomplished by Local 102 of the Sheet Metal Workers International Association. Mr. McAlwee stated that Local 26 would not abide by this decision and that if this work is assigned to and performed by Local 102 there would not be an electrician on the job. No work has been performed on these ceilings since about September 9, 1963.

The responsibility to do this work has been delegated to Foley-Ernst, a joint venture, as part of a sub-contract with McCloskey & Company, to do the entire electrical work in this building. This sub-contract is in excess of $4,300,000. On behalf of McCloskey & Company, I have directed Foley-Ernst to proceed with this work. Foley-Ernst has advised me that it would not assign the work to Local 102 of the Sheet Metal Workers International Association.

The completion of this building has been and is being delayed by this jurisdictional dispute. Partial occupancy of the building is required by the Architect of the Capitol on January 1, 1964.

/s/ JAMES C. MCCLOSKEY
James C. McCloskey

DISTRICT OF COLUMBIA, ss:

Subscribed and sworn to before me this 24th day of October, 1963.

/s/ IRENE L. JARVIS
Notary Public

NATIONAL JOINT BOARD FOR SETTLEMENT OF JURISDICTIONAL
DISPUTES BUILDING AND CONSTRUCTION INDUSTRY
815 SIXTEENTH STREET, N.W., WASHINGTON 6, D. C.
STerling 3-6817

July 20, 1963

In Reply Refer to:
D C 7/1863

EDWARD CARLOUGH, General President
Sheet Metal Workers International
Association
1000 Connecticut Avenue N W
Washington D C

GORDON M. FREEMAN, International President
International Brotherhood of Electrical
Workers
1200 15th Street N W
Washington D C

MCCLOSKEY COMPANY
Contractor
1620 Thompson Street
Philadelphia, Pennsylvania

FOLEY-ERNST
Subcontractor
315 First Street SW
Washington 24, D C

Gentlemen:

At its meeting July 18, 1963, the Joint Board considered the jurisdictional dispute between Sheet Metal Workers International Association and the International Brotherhood of Electrical Workers over erection of independently hung luminous egg-crate ceiling, hangers, tees, cross tees and wall angles. House Office Building project, Washington, D. C. McCloskey Company contractor, Foley-Ernst subcontractor.

The Joint Board voted to make the following job decision: The work in dispute shall be assigned to sheet metal workers.

This action of the Joint Board was predicated upon particular facts and evidence before it regarding this dispute and shall be effective on this particular job only.

Very truly yours,

William J. Cour
William J. Cour
Chairman

WJC/lma
cc: C. J. Haggerty—B&CT Dept.
E. T. Kelly—AGC
J. D. Wilder—SM & ACCA
NECA

Supplemental Affidavit of Bancroft T. Foley, Jr.

I, Bancroft T. Foley, Jr., being first duly sworn, do hereby depose and say:

That I am, and at all times hereafter have been, a duly authorized representative of Foley-Ernst, a joint venture between The Howard P. Foley Company (of which I am Vice President).

That, on September 30, 1963, by telegram, a copy of which is attached hereto, I informed the National Labor Relations Board that Foley-Ernst was not bound by the July 18, 1963, decision of the National Joint Board for Settlement of Jurisdictional Disputes.

That, by letter of October 21, 1963, a copy of which is attached hereto, and at my direction, Pogue and Neal, attorneys, on behalf of Foley-Ernst, informed the National

Joint Board that Foley-Ernst does not consider itself in any way bound by the National Joint Board's purported decision since the National Joint Board had violated its own rules and fundamental procedural fairness in that:

> (1) a representative of the Sheet Metal Workers' International Association, while a member of the National Joint Board, had participated in the case, and
>
> (2) the National Joint Board had failed to state its conclusions with respect to the principal material issues involved in the dispute.

That the Procedural Rules and Regulations of the National Joint Board provide:

> "C. *Procedural Rules for Joint Board Meetings*
>
> * * *
>
> 2. No labor member of the Joint Board shall vote or participate on a case involving the organization from which he is appointed; and alternate labor members shall serve in rotation in place of regular members.
>
> * * *
>
> "B. *Job Decisions*
>
> * * *
>
> 12. In addition to all other requirements in these Rules and Regulations with respect to the form of job decisions rendered by the National Joint Board, it is also required that any such decision shall include a brief statement of the description of the work in dispute and the conclusions of the Joint Board with respect to the principal material issues which are involved in the dispute. In the event that a decision is made by a divided vote, the minority shall be entitled to present its views in writing and the minority views

> shall be distributed together with the majority decision."

That the approved minutes of the National Joint Board show that Mr. J. J. O'Toole, a representative of the Sheet Metal Workers, was present at the hearings on this dispute.

....
Bancroft T. Foley, Jr.

Subscribed and sworn to before me
this .... day of October, 1963.

....
Notary Public

(SEAL)

WESTERN UNION
SENDING BLANK
9/30/63

Call Letters JFS Charge To Pogue & Neal

John A. Penello, Regional Director
National Labor Relations Board
6th Floor, 707 N. Calvert Street
Baltimore, Maryland

Regarding July 18, 1963 decision of National Joint Board for Settlement of Jurisdictional Disputes, Building and Construction Industry, re Additional House Office Building luminous ceilings and related work please be advised that we strongly disagree with such decision and are not bound by it. We urge and expedited hearing and decision under Sections 8-b-4-D and 10-k of the Act, with full participation by us. We are the subcontractor directly responsible for this work,

WESTERN UNION
SENDING BLANK
9/30/63

Call Letters JFS Charge To Pogue & Neal

(Page Two of Two)

and we have assigned it to the electrical workers.

Bancroft T. Foley, Jr.
Authorized Representative for
Foley-Ernst
(A Joint Venture)

LAW OFFICES
POGUE & NEAL
1001 CONNECTICUT AVENUE, N. W.
WASHINGTON 6, D. C.

October 21, 1963

The Hon. William J. Cour
Chairman, National Joint Board
for Settlement of Jurisdictional Disputes
Building and Construction Industry
815 Sixteenth Street, N. W.
Washington 6, D. C.

Re: Dispute between Sheet Metal
Workers, and Electrical
Workers, luminous egg crate
ceilings, Additional House Office
Building, Washington, D. C.

Dear Chairman Cour:

Foley-Ernst, joint-venture subcontractor for the above-described disputed work, hereby advises that it does not consider itself (or either of its constituent elements) in any way bound by the National Joint Board's purported decision of July 20, 1963, and as clarified on August 23, 1963, regarding the subject dispute.

This purported decision by the Joint Board is fatally defective because of two separate violations of the Board's own procedural rules. Neither of these violations is a mere procedural irregularity. Instead, each of them constitutes a failure to follow a fundamental procedural principle which has always been considered essential to a valid proceeding: (1) that the judges, arbiters, or referees shall be *impartial and objective* with regard to the matter in dispute, and (2) that those deciding such a case shall *state their basic reasons for their decision.*

These traditional concepts of fundamental procedural fairness are adopted by, and incorporated as minimum requirements into, the Joint Board's *own* procedural regulations:[1]

> "C. *Procedural Rules for Joint Board Meetings*
>
> . . .
>
> 2. No labor member of the Joint Board shall vote or participate on a case involving the organization from which he is appointed; and alternate labor members shall serve in rotation in place of regular members.
>
> . . .
>
> B. *Job Decisions*
>
> . . .
>
> 12. In addition to all other requirements in these Rules and Regulations with respect to the form of job decisions rendered by the National Joint Board, it is also required that any such decision shall include a brief statement of the description of the work in dispute and the conclusions of the

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[1] Citations herein are to "Procedural Rules And Regulations of the National Joint Board For Settlement of Jurisdictional Disputes Building and Construction Industry", dated April, 1962. (The Board's current rules are dated and effective "September, 1963"; these current rules in no way vary the provisions here involved.)

> Joint Board with respect to the principal material issues which are involved in the dispute. In the event that a decision is made by a divided vote, the minority shall be entitled to present its views in writing and the minority views shall be distributed together with the majority decision."

It cannot be disputed that the Joint Board's ruling of July 20 (as clarified August 23) 1963, completely failed to meet both of these requirements.

The Board's own Approved Minutes show that Mr. J. J. O'Toole, a representative of the Sheet Metal Workers, was present at both hearings involved (July 18 and August 22, 1963). Under the Board's own rules, Mr. O'Toole's presence would have been enough to completely vitiate the validity of any Board decision on this matter: "No labor member of the Joint Board shall vote *or participate on a case* involving the organization from which he is appointed. . . . (Procedure C. 2.)." Member O'Toole, however, went much further: the IBEW representative present advises that Mr. O'Toole was not only present, and sat with the other Board Members at one end of the hearing table, but also participated vigorously in the presentation of the case —in a manner favorable, of course, to the Sheet Metal Workers.

The second fatal error by the Board was its total failure to state its reasons, or "conclusions . . . with respect to the principal material issues," involved in the dispute. The Board's letter dated July 20, 1963, simply states that:

> "The Joint Board voted to make the following job decision: The work in dispute shall be assigned to sheet metal workers. This action of the Joint Board was predicated upon particular facts and evidence before it regarding this dispute and shall be effective on this particular job only."

The Joint Board's "clarifying" letter of August 23rd is equally succinct:

> "The Joint Board voted to clarify this job decision as follows: The installation of luminous egg-crate ceiling, hangers, tees, cross tees and wall angles shall be assigned to sheet metal workers. This action of the Joint Board was predicated upon particular facts and evidence before it regarding this dispute and shall be effective on this particular job only."

It is obvious that such a cursory and "boilerplate" statement completely fails to meet the absolute requirement of the Board's own rules (Procedure B. 12.):

> "*In addition* to *all other requirements* in these Rules and Regulations with respect to the form of job decisions rendered by the National Joint Board, *it is also required* that any such decision *shall include* a brief statement of the description of the work in dispute and the *conclusions* of the Joint Board *with respect to the principal material issues which are involved in the dispute.*" (Emphasis added.)

The reasons for such a requirement are both numerous and sound. This requirement assures, among other things: (1) careful and thorough consideration of the decision by the Board initially making the decision, (2) a basis for the parties' evaluating the availability or need for any form of rehearing or appeal, (3) facilitating such review or rehearing by the reviewing body, and (4) revealing—and thus preventing—any favoritism or other element of an arbitrary or capricious nature, or other action constituting a usurpation or extra-jurisdictional act.

Any party which has bound itself to the Joint Board's authority has of course done so on the understanding that these fundamental procedural safeguards would be available to it; the Joint Board itself, by the issuance of its

September 1963 edition of its Procedural Rules, has reaffirmed the inviolate nature of both rules involved herein.

It follows that the Board's purported decision hereunder is null and void. Foley-Ernst accordingly proposes that the Board promptly undertake to hear and decide this dispute on a *de novo* basis, and in strict accordance with the Board's own rules.

Very truly yours,

POGUE & NEAL
By: ROBERT H. SHORB
Robert H. Shorb
Attorneys for
Foley-Ernst (a joint venture)

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1 October 24, 1963.

The above cause came on for hearing before THE HONORABLE ALEXANDER HOLTZOFF, United States District Judge.

Appearances:

For the Plaintiff:
BENJAMIN K. BLACKBURN, ESQ.

For the Defendants:
RONALD ROSENBERG, ESQ.

Also Present:

PATRICK J. OGDEN, JR., ESQ.

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2 Mr. Blackburn: May it please the Court, I am here on behalf of the National Labor Relations Board seeking an injunction under the provisions of Article 29, Section 160(1), of the United States Code.

This case grows out of a work dispute over the building that is being constructed for the House of Representatives. I refer to it as the House of Representatives Office Building addition. McCloskey & Company is the prime contractor on that job. Foley-Ernst is the electrical subcontractor. Local 26, one of the respondents here, represents the employees of Foley-Ernst.

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3 Mr. Blackburn: The work involved in this dispute is so-called egg crate ceilings. Foley-Ernst has been engaged as part of its sub-contract with McCloskey, the prime contractor, in installing—

The Court: Would you mind stating again what the work is?

Mr. Blackburn: Egg crate ceilings, Your Honor.

The Court: What is that?

Mr. Blackburn: Ceilings made of sheet metal which are —well, they look like an egg crate in boxes of a dozen eggs.

The Court: You mean the ceiling is suspended—

Mr. Blackburn: Suspended, and there are square holes in the metal through which light shines; and this metal, as I understand it, and I am not a technician, but I think I am correct in saying that the purpose of this metal
4 is to diffuse the light.

These ceilings were being installed by Foley-Ernst as the electrical sub-contractor. * * *

* * * * * * * * * *

A dispute arose over the installation of these egg crate ceilings in early July. The dispute was between the electricians, who were represented by Local 26, and sheet metal workers, who are represented by Local 102 of the Sheet Metal Workers Association.

The Court: Who was doing the work when the dispute arose?

Mr. Blackburn: The work was being done by the electricians, by Foley-Ernst's employees.

The Court: Which union?

Mr. Blackburn: Local 26.

This dispute was submitted to the National Joint Board of the building and construction trades union, the AFL-CIO Board which has been set up to deal with jurisdictional disputes.

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5 * * * This Joint Board on July 18 rendered a decision in favor of the sheet metal workers.

The Court: Which union is it? So long as you use numbers here suppose we adhere to that.

Mr. Blackburn: Local 102.

The Court: In other words, Local 26 were the electricians and 102 were the sheet metal workers?

Mr. Blackburn: That is right, sir.

The Court: And the question was whether this work should be done by the electricians or the sheet metal workers?

Mr. Blackburn: That is correct.

The Court: And it was being done by the electricians?

Mr. Blackburn: That is right, sir.

The Court: I see.

6 Mr. Blackburn: But the Joint Board awarded it to the sheet metal workers.

The Court: I see.

Mr. Blackburn: Now, the decision handed down by the Joint Board referred to this work as independently hung egg crate ceilings and some other words about the other parts involved in hanging these egg crates.

Local 26 people disputed the decision and refused to comply with it on the ground that the work actually involved here on this project was not independently hung. In other words, they took the position that the decision of the Joint Board did not apply to the work in dispute.

Consequently, on August 22nd, the Joint Board clarified its decision to eliminate the words independently hung and to make it clear that the award by the Joint Board was being made for the work involved in the dispute between the electricians and the sheet metal workers.

The Court: And to whom did the Board award it?

Mr. Blackburn: They awarded it once again to the sheet metal workers.

During this interim between July 18 and August 22 there were two occasions upon which Robert McAlwee, Business Manager for Local 26, spoke words which the Labor Board
contends are threats under Section 158(b)(4)(ii)
7 and consequently constitute the unfair labor practice
here which brings us into Section 160(1), brings us here today seeking an injunction.

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8 Mr. Blackburn: Now, it is the contention of the
Labor Board that these words spoken by Mr. McAlwee as an agent of Local 26, the electricians, on these two occasions in August constitute the threat, coercion and restraint under (ii). * * *

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Mr. Blackburn: We are here involved with sub-
9 section (d), the jurisdictional dispute paragraph. * * *

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The Court: What are the threatening words or what are the words that you construe as threats?

Mr. Blackburn: In substance, sir, that if the work were assigned by Foley-Ernst, the electrical sub-contractor, to sheet metal workers rather than to electricians, that there would be a work stoppage on the job.

The Court: Are both of these unions members of the same international union?

Mr. Blackburn: Not of the same international. They are both in the AFL-CIO.

The Court: But they are members of different international unions?

Mr. Blackburn: That is correct, sir. Local 26 is a member of the International Brotherhood of Electrical Workers. Local 102 is a member of the Sheet Metal Workers Association.

The Court: Who is doing the work now?

10 Mr. Blackburn: The work is not being done now, sir, and that is the reason we are here for an injunction.

The Court: When did the work stop?

Mr. Blackburn: The work stopped in early September,

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* * * since that time the work has been at a standstill pending the outcome of this litigation. It was at that time that the charge was filed with the Labor Board.

* * * * * * * * * *

The Court: The Joint Labor Board awarded the job to Local 102, the sheet metal workers?

Mr. Blackburn: That is right, sir.

The Court: The Business Manager, you say, of Local 26 of the electrical workers is threatening a strike?

Mr. Blackburn: That is right, sir.

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11 Mr. Blackburn: Well, electrical work was continuing to be done. You must understand, sir, that Foley-Ernst's sub-contract covers all of the electrical work on this building and the installation of these egg crates is only a part of this work.

The Court: But nobody is working on—

Mr. Blackburn: On the egg crates. No one is working on them, sir.

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12 The Court: I understand that. Now, is that delaying the completion of this building?

Mr. Blackburn: It is indeed, sir.

The Court: Because that is a very important public building. It is in the public interest that the building be completed on time.

Mr. Blackburn: As a matter of fact, I was informed just this morning that a January 1st deadline has been set by the Architect of the Capitol for at least a partial occupancy
of this building, and I am prepared to present testi-
13 mony to that effect.

The Court: We don't take testimony, oral testimony in these matters. You have affidavits supporting all your statements, have you not?

Mr. Blackburn: I don't have affidavits in support of these statements. I have the witnesses, Your Honor, here, however, and I can take their affidavits here and now today. I came here prepared to present them in open court.

The Court: No, we don't do that on motions for injunctions.

Now what do your affidavits show?

Mr. Blackburn: My affidavits show that, first, there was a meeting in the office of Mr. —

The Court: Suppose you tell me what part of the factual statements you have so far made is supported by affidavits before me or, if you wish, you can say which part is not supported.

Mr. Blackburn: None of these are supported by affidavits before Your Honor because I have submitted no affidavits in connection with this case. However, permit me to say that in those facts which I have just stated, the only thing that is in dispute is the words spoken by Mr. McAlwee on the two occasions that I have mentioned.

The Court: But what is there before the Court on
14 the basis of which I can grant an injunction?

Mr. Blackburn: I have witnesses here to testify to the things which are in dispute, Your Honor.

The Court: We don't take oral testimony; we decide motions for preliminary injunctions on affidavits.

Is there any record of the facts that are not in dispute?

Mr. Blackburn: Of all the facts which I have stated at this point, I think Mr. Rosenberg will agree—

The Court: But—

Mr. Blackburn: Those in the petition are what I have been stating, Your Honor. I think Mr. Rosenberg will agree with that.

The Court: Which of the facts that you have stated are not in the petition? In other words—

Mr. Blackburn: None of the facts that I have stated are not in the petition.

The Court: In other words, everything is in the petition?

Mr. Blackburn: That is right, sir.

The Court: But the petition can't take the place of an affidavit because it is not sworn to.

Mr. Blackburn: I am aware of that, sir.

The Court: Has an answer been filed?

15 Mr. Blackburn: No, sir, no answer has been filed in this case.

The Court: When was the petition served? I notice it was filed here on October 23rd.

Mr. Blackburn: The 3rd day of October, sir.

The Court: The service was made on the 4th of October, so this is the last day to answer.

Mr. Rosenberg: Your Honor, I am Mr. Rosenberg, attorney for the respondents. A motion to dismiss was filed today, Your Honor, with supporting affidavits and Mr. Blackburn was served.

The Court: You can't have a motion to dismiss with supporting affidavits; you can have a motion for summary judgment with supporting affidavits.

Mr. Rosenberg: Then under Rule 12, Your Honor, that can be treated as a motion for summary judgment.

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16 Mr. Blackburn: I say of the facts which I have spoken of here this morning and the facts which are in the petition, the only thing that I understand Mr. Rosenberg is disputing—and I have not had the advantage

of an answer in this case; I am only basing these statements on telephone conversations I have had with Mr. Rosenberg over the last week or so about this case—the only thing that is in dispute is that Mr. McAlwee denies speaking the words that my witnesses will testify he did speak.

The Court: Well, I will hear the other side.

Mr. Rosenberg: My name is Ronald Rosenberg, Your Honor. I think that Mr. Blackburn—

17 The Court: Whom do you represent?

Mr. Rosenberg: I represent both Local 26 of the International Brotherhood of Electrical Workers and Mr. Robert McAlwee, the Business Representative of that local union.

* * * * * * * * * *

20 The court: I understood Mr. Blackburn to say the one disputed fact is whether Local 26 threatened to strike if sheet metal workers were permitted to do the job. Did they? Do you admit that they did or do you deny it?

Mr. Rosenberg: We deny, Your Honor, that there has ever been a threat by Local 26.

The Court: Very well, then let me ask you this. If the sheet metal workers are ordered to resume this work and they resume it, will Local 26 call a strike?

Mr. Rosenberg: Your Honor, the only person who could order the sheet metal workers to do this work is Foley-Ernst, the electrical sub-contractor, who has—

The Court: No, I am asking you a question. Suppose Foley-Ernst abides by the award of the Joint Board and calls the sheet metal workers, that is, the members of Local 102 back to work and they come back to work. Then
what is Local 26 going to do? Do you want to answer
21 the question? You don't have to if you don't
want to.

Mr. Rosenberg: If I may, Your Honor. Because—

The Court: Just a moment. Don't try to cut the Court off. Proper decorum in the courtroom is for counsel to wait until the Court finishes.

Now I am going to repeat my question. The Joint Board, as I undersand it, awarded this work to Local 102, the sheet metal workers. Suppose the contractor, Foley-Ernst, decides to abide by that award and calls the sheet metal workers in to do this work and they respond and start doing this work. Will Local 26 do anything about it, or not?

Mr. Rosenberg: I don't know, Your Honor.

The Court: You don't know?

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* * * Suppose whoever the sub-contractor on this egg crate ceiling is calls the sheet metal workers to come in
and do the job as the Joint Board awarded and the
22 sheet metal workers come in and start working on
this job, will Local 26 do anything about it?

Mr. Rosenberg: I don't know, Your Honor. But if they did, Your Honor, at that point in time a petition comparable to the one now before Your Honor would be appropriate.

The Court: We are not going to wait. In the meantime the public interest is suffering.

Mr. Rosenberg: I'm sorry, Your Honor.

The Court: In other words, you are not in a position to commit Local 26 to abide by the award of the Joint Board?

Mr. Rosenberg: Your Honor, what is before you today is not the question of whether or not the Joint Board award should be honored.

The Court: No, no; don't argue with the Court. You may present an argument to the Court. If you don't want to answer the Court's question, say so. If you are unable to answer the Court's question, you may say so. But my question to you is, will Local 26 abide by the award of the Joint Board?

Mr. Rosenberg: Your Honor, my answer is that I cannot assure Your Honor that Local 26 will abide with that rule—with that Joint Board award. Since the time of the filing of this petition Foley-Ernst and Local—

The Court: Just a moment. Your answer is that
23 you are unable to answer my question? First
answer the question or say you are unable to answer
it, without any embellishments.

Mr. Rosenberg: I am unable to answer that question, Your Honor, but I would—

The Court: Beg pardon?

Mr. Rosenberg: I am unable to answer that question because I have not been authorized to make that statement.

The Court: I think that is a proper position for a member of the bar to take. Your client has not authorized you to take a position on that. That is perfectly proper. That is what I wanted to know. Now you may proceed with your argument.

Mr. Rosenberg: The issue before Your Honor is not the question of whether or not the Joint Board's award is to be enforced. The issue before Your Honor is whether or not Local 26, the electrical workers, respondents in this case, have committed an unfair labor practice, whether or not they have threatened McCloskey & Company with an object of forcing or requiring Foley-Ernst to assign the work in question to them. I submit to Your Honor that these matters are principally factual. The affidavits that I have submitted prove, at least for present purposes since there is no affidavit by the petitioner—

The Court: Did you submit any affidavits?

24 Mr. Rosenberg: Yes, I did submit affidavits, Your Honor.

The Court: I don't see them here.

Mr. Rosenberg: They are attached to the motion to dismiss, Your Honor. There is an affidavit by Bancroft Foley, who is the authorized representative of Foley-Ernst.

The Court: Yes.

Mr. Rosenberg: And an affidavit by Robert McAlwee, one of the named respondents.

Those affidavits make clear, I believe, Your Honor, and there is no contrary assertion, that—

The Court: I think there is a misunderstanding on the part of counsel and I think it is a very common misunderstanding. This Court on a motion such as this does not decide whether the union or anyone else has been guilty of an unfair labor practice. That is to be decided by the Board. All that the Court does is to decide whether there is reasonable ground to believe that an unfair labor practice has been committed justifying a preliminary injunction until the Board can decide whether an unfair labor practice has been committed.

These actions are sort of sui generis. The Court should not make definite findings of fact as to whether the union
has committed an unfair labor practice. That is for
25 the Board. All that the Board asks this Court to
do is to grant a preliminary injunction on the
theory that there is probable cause to believe that an unfair labor practice has been committed.

Mr. Rosenberg: Yes, Your Honor, but in the absence of any form of affidavit by the Board—I agree with Your Honor entirely in your statement of the law, but in the absence of any affirmative representation by affidavit or by testimony by the Board we have nothing, Your Honor, before us which would permit Your Honor to find reasonable cause. And I point out again, Your Honor, that the critical facts involved in this case have been disputed by the affidavits which I have submitted.

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Mr. Rosenberg: Number one, Your Honor, as I indicated before, there are critical facts in dispute.

On page 4 of the petition filed by the National Labor Relations Board, by Mr. Penello as petitioner, 5(j) thereof, the petitioner states that notwithstanding the aforesaid, Respondent Local 26 has continued to demand that Foley-Ernst assign the work referred to in subparagraph (g) above to employees represented by Local 26. Your Honor, in fact no such demand has ever been made upon Foley-Ernst by Local 26, as witness the 26 affidavits which I have given to Your Honor and which are uncontroverted.

The Court: I am looking at the affidavits.

Mr. Rosenberg: At the same page, Your Honor, 5(k) thereof, the critical allegation is that respondent Robert McAlwee on or about August 9th and on or about August 13th threatened McCloskey and Foley-Ernst—

The Court: Whose affidavit are you reading?

Mr. Rosenberg: I am reading from the Board's petition.

The Court: Which paragraph.

Mr. Rosenberg: This is 5(k) of the Board's petition at page 4, Your Honor.

The Court: Very well, you may proceed.

Mr. Rosenberg: In the middle of the page, Your Honor. That allegation is directly contradicted in affidavit form by Mr. McAlwee, as the previous statement about the demands for work was contradicted by Mr. Foley, who is the authorized representative of Foley-Ernst.

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28 Mr. Rosenberg: On 8(b)(4)(d), the jurisdictional dispute, a prerequisite of that charge and the issuance of a complaint based on that charge is that there be a threat. We have by affidavit form, Your Honor, shown that there has been no such threat. There is nothing that contradicts that.

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30 Your Honor, I cannot urge too strenuously there has been no unfair labor practice committed here. There is nothing whatsoever in this record which supports the allegation that there has been an unfair labor practice. There is no factual material whatsoever indicating that

there has been a threat of the type required by 29
31 USC 158. There is no indication that the object
banned by that same section existed in the mind of
Local 26. * * *

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The Court: I can't see how putting up ceilings is work of an electrician. Running electrical wires and installing electrical fixtures would be the work of an electrician, but hanging a ceiling, how is that the work of an electrician?

Mr. Rosenberg: By the decision of Foley-Ernst, the employer in question, who is the electrical sub-contractor on this job, who has responsibility for the performance of this work, who has voluntarily assigned this work to the electricians and has indicated in the affidavit by Bancroft Foley, Jr., its intention to continue to give that work to the members of the electricians and its desire to do so because if it were to put men who were untrained in this type work on the work, someone other than a trained electrician, that would prove costly to the Foley-Ernst Company. That appears, Your Honor, in the
32 affidavit of Bancroft Foley which was submitted.

The Court: Let me see that.

Mr. Rosenberg: This is on the second page, Your Honor, the third paragraph thereof.

The Court: I see.

Mr. Rosenberg: Your Honor, since Your Honor is at the affidavit, the National Labor Relations Board has been informed of Mr. Foley's desire, as witness the following paragraph of the affidavit. By telegram Foley-Ernst, the very person who we are charged with forcing or requiring to assign us this work, informed the National Labor Relations Board that he desired to give us this work.

Your Honor, under such circumstances, to say that we woud threaten someone to force or require Mr. Foley to give us what he has always wanted to do and has always done I think is a frivolity. And that, Your Honor, is basically our position before you today. Thank you.

The Court: Mr. Blackburn.

Mr. Blackburn: Your Honor, I would submit, on the basis of Mr. Rosenberg's own statement, that it's fairly clear, I suggest to the Court, at this point, that the only real issue before the Court at this point is whether these threats were in fact made or not.

The Court: Yes. What do you say about the
33 affidavit of Bancroft T. Foley in which he says he
wants members of Local 26 to do the work and he
has assigned it to them? It doesn't seem that there would
be any sense in making threats of the type that you suggest.

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34 Mr. Blackburn: * * *

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To get to the other aspect of your question, Your Honor, the problem of the threat, it is not necessary that the threat be directed to Foley-Ernst. The threats here in fact, as our position makes clear, are also directed to McCloskey.

The Court: McCloskey is the prime contractor?

Mr. Blackburn: Yes. And it's a threat of work stoppage on this job made to representatives of the prime contractor. So even if Mr. Rosenberg is correct in saying that the threat has not been made to Foley-Ernst—and I don't mean to be understood to concede that—he still hasn't addressed himself to a key fact here, the fact that the threat has also been made to McCloskey.

The Court: Now—

Mr. Blackburn: May I go on, sir?

The Court: Yes.

Mr. Blackburn: I am going to leave this point and go to another aspect of the case.

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35 * * * if the Court feels that it must have
affidavits to support the area here which is in dispute,
I am quite prepared to present those affidavits—

The Court: You have anticipated what the Court was going to do.

Under the rules it is discretionary with the Court to take oral testimony or to determine motions for preliminary injunctions on affidavits. Our usual practice here is to determine those matters on affidavits. We have to do that, except in exceptional instances, because of the volume of our business. If I devoted a day to taking oral testimony, what would happen to all the other motions that are waiting to be heard? A country court or a court in a small town, where they have a case set for today and another one for next week, they can afford the time.

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36 Now, I am going to give the Board an opportunity to submit affidavits, of course. As I said earlier in the argument, I am not going to decide anything on technicalities.

Mr. Rosenberg: Pardon me, Your Honor. I would like to point out to the Court that 29 USC Section 160(1) provides that, upon the filing of any such petition of the type filed herein, the Court shall cause notice thereof and the opposing party shall be given an opportunity to appear by counsel and present any relevant testimony.

The Court: Well, testimony can be presented either orally or by affidavits. You have presented your affidavits.

I want to say this, gentlemen: this is a matter that is peculiarly appropriate to be determined on affidavits because I would not make any findings of fact as to whether a threat was made or not. That is for the Board to determine. All I have to determine is whether there is probable cause for an injunction, a preliminary injunction pending the decision of the Board. Of course, I have always taken the position that if the Court grants a preliminary injunction the Board must give immediate preference to the case and dispose of it expeditiously; otherwise, I woud entertain a motion to dissolve the injunction if the Board does not dispose of it within a reasonable time.

So I am going to continue this matter for a few—

37 Mr. Rosenberg: Your Honor, may I be heard further?

The Court: I am going to continue this matter for a few days in order to enable affidavits to be submitted.

* * * * * * * * * *

39 October 28, 1963.

The above cause came on for hearing before The Honorable Alexander Holtzoff, United States District Judge.

Appearances:

For the Plaintiff:

Benjamin K. Blackburn, Esq.

For the Defendants:

Ronald Rosenberg, Esq.

Also present:

Patrick J. Ogden, Jr., Esq.

* * * * * * * * * *

40 The Court: Gentlemen, I have read all of the affidavits that have already been submitted except the supplemental affidavit of Bancroft T. Foley, which has just been handed to me. So I am going to ask you to suspend for a couple of minutes while I am reading it.

(Brief pause.)

The Court: Now I want to ask both counsel and I want to apprise both counsel that I have read all the affidavits, those that were filed originally, those that were filed

Friday, and the supplemental one now. Do counsel wish to supplement their argument in any way?

Mr. Blackburn: No, sir, I am ready to stand on the argument that I made last Thursday.

The Court: Did you wish to address the Court, Mr. Rosenberg? Well, suppose you wait a moment.

I have some questions to address to you, Mr. Blackburn.

* * * * * * * * * *

41 Now I want to make another inquiry of you. As I read the affidavits there is no proof whatever that there was any threat directed to Foley-Ernst. The only threat, if any, was directed to McCloskey, because McAlwee denies that he ever threatened Foley-Ernst and Foley-Ernst says they have never been threatened; and in fact there wouldn't have been any sense in threatening Foley-Ernst because Foley-Ernst wants to give this job to the electricians and say so.

Mr. Blackburn: I can't agree with you on this point, Your Honor. 42

The Court: I am not arguing with you; I am asking you to present any argument that you wish on this point and in order to assist you I want to let you know what is in my mind.

Mr. Blackburn: My argument simply goes to the nature of the meeting on August 13 in Mr. Ryan's office when, according to Mr. Cash's affidavit, Mr. McAlwee spoke the words which we construe as a threat, the words being if the work was assigned to the sheet metal workers by Foley-Ernst there would be no electricians on the job.

The Court: Yes, but it wasn't a threat against Foley-Ernst, as I see it, because in the first place Foley-Ernst says they did not construe it as a threat; in the second place, they want to give the job to the electricians. So a threat against them would be meaningless, wouldn't it?

Mr. Blackburn: No, sir, I can't agree. If I may continue—

The Court: Suppose you tell me what your view is on that.

Mr. Blackburn: Well, the first point, sir, is that Mr. Foley himself was present in this meeting, so that these words were spoken in his presence. So the words were addressed as much to McGloskey as they were to Foley-Ernst.

43 Now, whether they in fact constitute a threat to Foley-Ernst, sir, I think you have to reach that conclusion from the fact, one, that there is other electrical work being done by Foley-Ernst under this sub-contract. The installation of these egg crate ceilings is not all of the work. There is much more electrical work which, if this work were assigned to the sheet metal workers, would continue to be done by Foley-Ernst under its contract. Consequently, a threat to have no electricians on the job is in fact a threat directed to Foley-Ernst not to have any workmen present to do the work which they will continue to do.

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48 The Court: Mr. Rosenberg, do you wish to supplement your argument in any way?

Mr. Rosenberg: Your Honor, I would only like to point out that the admissions that Mr. Blackburn has made before Your Hnoor today, and Your Honor's questions, indicate the complete failure of the National Labor Relations Board, the plaintiff here, to show even reasonable cause that the unfair labor practice charge has in fact been committed. Your Honor pointed out that there were really no threats to Foley-Ernst. The affidavit of Mr. Foley, both supplemental—

The Court: I am not going to find any threats so far as Foley-Ernst is concerned. The only threats relate to McCloskey.

Mr. Rosenberg: * * *

• • • • • • • • • •

58 In conclusion, Your Honor, I would like to point out once more that factually there is nothing to this case in terms of what the Board has presented Your Honor. There is nothing whatsoever in this record that indicates that Local 26, the defendants, have ever threatened anyone with the objects that the National Labor Relations Board has charged.

* * * * * * * * * *

63 The Court: As I understand it, Mr. Rosenberg's
point is that the Board may not institute the type
of proceeding that it has instituted in case of a juris-
dictional strike but must first institute a 10(k) proceeding
because it is provided in 10(k), 160(k) of the United States
Code, that whenever it is charged that any person has
engaged in an unfair labor practice, within the meaning
of Paragraph 4(d) of Section 158(b) of this Title,
64 the Board is empowered and directed to hear and
determine the dispute out of which such unfair
labor practice shall have arisen, unless within ten days
after notice that such charge has been filed the parties
to such dispute submit to the Board satisfactory evidence
that they have adjusted or agreed upon methods for the
voluntary adjustment of the dispute.

Now has the ten day period expired since the charge was filed?

Mr. Blackburn: Yes, sir, it has.

The Court: Have both parties to the dispute submitted evidence either that they have adjusted or that they have agreed upon methods for the voluntary adjustment of this particular dispute?

Mr. Blackburn: They have submitted evidence that they have agreed upon methods for the voluntary adjustment of the dispute, that evidence being the fact that they went to the Joint Board and, secondly, that all parties to the dispute, both labor organizations and Foley-Ernst, are bound by the decision of the Joint Board.

This is the evidence which was submitted to the Regional Director which causes Section 10(k) not to be applicable to this case and which causes this case to be distinguishable from the CBS decision of the Supreme Court, sir.

* * * * * * * * * *

Filed October 28, 1963

Order Granting Temporary Injunction

This cause came on to be heard upon the verified petition of John A. Penello, Regional Director of the Fifth Region of the National Labor Relations Board, for and on behalf of said Board, for a temporary injunction pursuant to U.S.C. Art. 29 Sec. 160(1) pending the final disposition of the matters involved pending before said Board, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed in said petition. The Court, upon consideration of the petition, motion to dismiss, affidavits, memoranda, argument of counsel, and the entire record in the case, having orally announced its Findings of Fact and Conclusions of Law, finds and concludes that there is reasonable cause to believe that Defendants have engaged in, and are engaging in, acts and conduct in violation of U.S.C. Art. 29 Sec. 158(b)(4)(ii)(D), affecting commerce within the meaning of U.S.C. Art. 29 Secs. 152(6) and 152(7), and that such acts and conduct may be repeated or continued unless enjoined.

Now, therefore, it is by the Court this 28th day of October 1963,

ORDERED, ADJUDGED AND DECREED that, pending the final disposition of the matters involved pending before the National Labor Relations Board, Defendants Electrical Workers Local 26, International Brotherhood of Electrical Workers, AFL-CIO, and its agent Robert McAlwee, their officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them, be and they hereby are, enjoined and restrained from:

(a) Threatening or causing any work stoppage or strike at the additional House of Represntatives Office Building project in Washington, D. C., for the object of forcing Foley-Ernst to assign the work of installing luminous egg-crate ceiling, hangers, tees, cross tees and wall angles at said project to employees who are members of, or represented by, Defendant Local 26 rather than to employees who are members of, or represented by, Sheet Metal Workers Local 102, Sheet Metal Workers International Association, AFL-CIO and who are not members of, or represented by Defendant Local 26;

(b) In any manner or by any means, threatening, coercing, or restraining McCloskey, or any other person engaged in commerce or in any industry affecting commerce, where an object is the object set forth in subparagraph (a) above.

/s/ Alexander Holtzoff
United States District Judge

A True Copy

Test:

Harry M. Hull, *Clerk,*

By /s/ Meriam M. Jenkins
Deputy Clerk

Seen /s/ Ronald Rosenberg
Attorney for Defendants

Oral Opinion

Holtzoff, District Judge: This is an application by the National Labor Relations Board for a temporary or interlocutory injunction to restrain a labor union from certain specified activities during the pendency of a proceeding before the Board. The application is presented under the provisions of Section 10(1) of the National Labor Relations Act, found in 29 U.S.C. § 160(1). This statute in effect provides that whenever it is charged that any person has engaged in any one of certain specified unfair labor practices and if, after making a preliminary investigation, the Regional Director or Regional Attorney of the National Labor Relations Board has reasonable cause to believe such charge is true and that a complaint should issue, he shall on behalf of the Board petition for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter.

When this proceeding was instituted there were two charges of unfair labor practices presented. One was a threat on the part of the respondent union to force or require an employer to assign particular work to employees of the respondent union. This unfair labor practice is defined in 29 U.S.C. § 158(b)(4)(ii)(D). There was also another charge, namely, a threat to carry out or institute what is generally known as a secondary boycott. The second charge is not being pressed and the Court therefore will direct its attention only to the first charge. It might be said that perhaps the reason why the second charge is not being pressed is that the affidavits submitted on this motion do not establish the existence of the alleged offense contained in the second charge.

[Jurisdictional Dispute]

This case involves a jurisdictional dispute between two unions. It relates to the construction of the second New House Office Building now in process of erection in this

City. The prime contractor for the construction of the building in McCloskey & Company. One of the sub-contractors is a joint venture known as Foley-Ernst, which has a contract for some of the electrical work and some of the work of constructing ceilings in the building. One of the functions of the sub-contractor was to hang or construct so-called egg crate ceilings. It is understood from the oral argument that an egg crate ceiling is a ceiling which, among other things, has apertures through which electrical fixtures are hung. Originally the employees engaged in doing this work for the sub-contractor were electricians who were members of the Electrical Workers Local 26 of the International Brotherhood of Electrical Workers. Sheet metal workers, however, represented by Sheet Metal Workers Local 102 of the Sheet Metal Workers International Association claimed that the work should properly be assigned to them. Some time ago there was established by the American Federation of Labor-Congress of Industrial Organizations, a National Joint Board for settlement of jurisdictional disputes in the building and construction industry. This Board was created by joint action of the labor unions and some of the builders engaged in that industry. This Board held hearings in order to determine the controversy between Local 26, representing the electricians, and Local 102, representing the sheet metal workers. The Board awarded the work to the sheet metal workers. It appears, however, that the electricians were not willing to acquiesce in this decision and neither was Foley-Ernst because Foley-Ernst preferred to continue to have the work done by electricians for some reason best known to itself.

McCloskey, the prime contractor, thereupon filed two charges with the National Labor Relations Board, one being a threat of a secondary boycott which has been abandoned, and the other being that Local 26 refused to abide by the award and threatened McCloskey and Foley-Ernst with work stoppages and strikes if sheet metal workers were hired to do the job as required by the award of the National Joint Board. In the meantime the work on the ceilings has stopped and nothing has been done on them, according to the papers and statements of counsel, since September 9th. While the work on the building is continuing, it is stated that the suspension of the work on the ceilings may result in a delay of completion of the entire structure.

The Board has issued or filed a complaint. The Regional Director thereupon filed a petition for a preliminary or temporary injunction to continue until the disposition of the complaint by the Board. The Regional Director alleges that he has reason to believe the charges to be true.

[FUNCTION OF COURT]

At the outset it is necessary to bear in mind the function of the Court in passing upon an application for an injunction authorized by the statutory provision, to which reference has been made, as well as the limitations on the powers and authority of the Court in that connection. The Court does not determine whether the charges have in fact been sustained and whether the respondent union, in this case Local 26, is actually guilty of an unfair labor practice. If there is conflict in the evidence, the Court does not resolve the conflict. All these matters are for the determination of the Board and the Court would be going beyond the function reposed in it by statute if it attempted to make findings of fact or conclusions of law that would definitively determine either questions of fact or questions of law. The only function of the Court is to decide whether there is probable cause to believe the charge or the charges to be true. The Court must stop at that point. For the Court to ascertain the facts would be going beyond its function and attempting to do what the law leaves to the National Labor Relations Board. If the Court attempted to make such findings, they would have no legal or binding effect. Actually, they might hamper or embarrass the Board in performing its functions.

These propositions of law are well established by the authorities. Thus, in Douds v. Milk Drivers and Dairy Employees Union, Local 584, 248 F.2d 534, 537, 40 LRRM 2669, the Court of Appeals for the Second Circuit stated:

> "The District Court was not required to make final or even preliminary findings as to the truth or falsity of the facts alleged in the petition of the Director. By the terms of Section 10(l) the Court's function is limited to ascertaining whether the Director could have 'reasonable cause to believe' that the charges filed were true and to granting such equitable relief as it deems just and proper."

In McLeod v. Compressed Air Foundation etc., Local 147, 194 F. Supp. 479, 481, 48 LRRM 2384, affirmed by the Court of Appeals for the Second Circuit in 292 F.2d 358, 48 LRRM 2655, the Court stated:

> "On an application of this nature the Court may not determine whether or not the Act has been violated as charged since any determination on the merits must be made by the Board. The sole duty of the Court is to ascertain whether the Regional Director had a reasonable cause to believe that the Act has been violated."

Numerous other cases held to the same effect. Graham v. Retail Clerks International Association, Local No. 57, 188 F. Supp. 847, 852, 47 LRRM 2009; Penello v. Local Union No. 59, Sheet Metal Workers International Association, 195 F. Supp. 458, 471, 48 LRRM 2495; Kennedy v. Construction, Production and Maintenance Laborers' Union, Local 383, 199 F. Supp. 775, 777, 48 LRRM 2791.

[THREAT OF STRIKE]

The basic facts out of which this case arises, as they have been summarized, are not in dispute. What is in dispute is the vital charge that a strike of electricians has been threatened by the respondent union, Local 26, against the prime contractor. The prime contractor alleges that it has been, while the respondent denies the making of the threat. Both sides have submitted detailed affidavits in support of their factual contentions.

While the charge advanced by the Board is that such a threat has been made by the respondent both against McCloskey, the prime contractor, and Foley-Ernst, the sub-contractor, there is not sufficient proof of any threat directed against the sub-contractor. Both the representative of the union and the sub-contractor expressly deny any such threat. None appears to have been necessary because Foley-Ernst, the sub-contractor, has indicated not only a desire but an intention to disregard the decision of the National Joint Board and to continue employing electricians for this particular task.

It is otherwise, however, as to the threat to call an electricians' strike charged to have been directed to McCloskey, the prime contractor. Affidavits submitted in behalf of the Board indicate that a conference took place between representatives of the two unions, a representative of the prime contractor and a representative of the sub-contractor. It further appears that during this meeting a telephone conversation took place with J. C. McCloskey at his office in Philadelphia. He was a Vice-President of McCloskey & Company. Affidavits submitted in behalf of the Board indicate that at that conference Mr. McAlwee, the representative of Local 26, stated that if the work assignment was changed from the electricians to the sheet metal workers there would be no electricians on the job.

In a sense this statement is ambiguous. It might be just a prophesy. On the other hand, the persons participating in the conference were realists and they construed this statement as an intimation that jurisdictional strike would be called if the work assignment was changed from the electricians to the sheet metal workers. An affidavit was submitted by Mr. McAlwee denying that he ever made any threat and likewise a representative of the sub-contractor denied that any threat was made.

What constitutes a threat, of course, is often a matter of inference or interpretation. At best, there is a conflict. The fact of the conversation is not denied by McAlwee. He merely denies that he ever made a threat. As indicated before, it is not for the Court to resolve the conflict.

The Court finds that the Regional Director had reasonable ground to believe that the charge just referred to was true.

[QUESTION OF LAW]

Counsel for the respondent union also raises a question of law as to whether a proceeding such as has been instituted by the Board may be properly maintained or whether the proper course for the Board to pursue is to conduct a so-called 10(k) proceeding, that is, a proceeding under 29 U.S.C. § 160(k), which relates to the resolution of jurisdictional disputes. This doubtful question of law likewise must be determined, in the first instance, by the Board. Whether there is an eventual review of any determination that the Board might make is something that should not be decided at this juncture.

Consequently, the Court concludes as a matter of law that the injunction prayed for should be issued.

There are a couple of other matters to which the Court desires to advert at this point. At one time in the course of the argument the respondents' counsel asked leave to supplement his affidavits by oral testimony which the Court deemed unnecessary. Rule 43(e) of the Federal Rules of Civil Procedure provides that:

"Where a motion is based on facts not appearing of record the Court may hear the matter on affidavits presented by the respective parties, but the Court may direct that the matter be heard wholly or partly on oral testimony or depositions."

In other words, the more usual practice is to hear motions on affidavits, although the Court in its discretion may take oral testimony. Ordinarily in this Court the practice is to hear motions on affidavits and it is the exception to take oral testimony. It would be very burdensome indeed if oral testimony was heard on a great many motions because this Court is so busy that it frequently has to hear and determine 10 to 15 motions a day.

If it was the function of the Court, however, to resolve the questions of fact and to determine a question of veracity, the Court would have been inclined to hear oral testimony, even of its own motion, because matters of credibility and veracity cannot be easily determined on affidavits. All that the Court must do here, however, and all that it is restricted to doing is to decide whether reasonable cause has been established, that is, reasonable and probable cause, and that can readily be done on the basis of affidavits. It is true that the statute under which this proceeding is brought authorizes parties to present any relevant testimony. Relevant testimony, however, may be presented by affidavit, by deposition, or by witnesses testifying orally. The statute does not profess to limit the discretion of the Court in that respect.

[Balance of Convenience]

In determining whether to grant the injunction the Court must be guided by general equitable principles. The balance of convenience clearly predominates in favor of the petitioner. If as it is claimed there has been no threat and there is no intention to engage in a jurisdictional strike, the respondent would not be unduly burdened by the injunction. On the other hand, to deny the injunction, if it should turn out that a threat actually was made and there is an intention to put it into effect, the result might be adverse to the best interests of the public as well as the contractor and the employees themselves.

This dispute is in an incipient stage because the Court is informed that no one has lost his job as yet since there is other sheet metal work and electrical work that is being pursued on this building. The dispute should be checked and resolved while it is still in an embryonic state. It is a well known fact that jurisdictional disputes among labor unions have sometimes expanded to a point at which they have become the bane of trade unionism and on occasion have worked havoc. They may lead to futility and frustration. A jurisdictional strike sometimes creates a situation where there is work to be done by one of two groups of laboring men and yet both are out of work and the families of all of them suffer financially. Unemployment insurance funds may be unfairly depleted and in extreme instances public relief rolls may become improperly burdened. The employer often, in the case of a jurisdictional strike, stands helpless and must cease business until the dispute is resolved. The public is always adversely affected, and in this instance where the project is the construction of a large and important Government building, the Government would be seriously prejudiced. I might say that when these jurisdictional strikes continue and become publicized, labor unions sustain a loss of public esteem, for the public is likely to become disgusted and look with disdain upon such proceedings.

[NATIONAL JOINT BOARD]

A far reaching step has been taken by far-sighted labor leaders in establishing, with the cooperation of some of the employers, a National Joint Board to resolve jurisdictional disputes in the building industry, but unless the unions are willing to cooperate and abide by decisions of the Board the creation of such a Board will not effectuate its objective. Here we have a union that is recalcitrant and rebels against the decision of the Board and declines to abide by it. Such situations might well lead to an approach to anarchy and chaos in the labor field.

The Court of course assumes in granting a temporary injunction that the Board will expeditiously dispose of the proceeding before it. If it fails to proceed with reasonable dispatch the Court will entertain a motion to dissolve the injunction.

A transcript of this oral decision will constitute the findings of fact and conclusions of law. Counsel will submit an appropriate order in accordance with this ruling.

Notice of Appeal

Notice is hereby given this 31st day of October, 1963, that Electrical Workers Local 26, International Brotherhood of Electrical Workers, AFL-CIO and Robert McAlwee, defendants, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 28th day of October, 1963 in favor of the plaintiff against said defendants.

Van Arkel & Kaiser
By /s/ Ronald Rosenberg
Attorney for Defendants
1730 K Street, N.W.
Washington, D. C. 20006

BRIEF FOR APPELLANTS

IN THE
United States Court of Appeals
For the District of Columbia Circuit

No. 18,263

Electrical Workers Local 26, International Brotherhood of Electrical Workers, AFL-CIO, and its Business Agent Robert McAlwee, *Appellants,*

v.

John A. Penello, Regional Director of the Fifth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, *Appellee.*

**On Appeal From the United States District Court
For the District of Columbia**

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 5 1964

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CLERK

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Press of Byron S. Adams, Washington, D. C.

QUESTIONS PRESENTED

1. May a district court in a proceeding under Section 10(1) of the Labor Management Relations Act issue an injunction without giving the opposing party the right to present oral testimony and to cross-examine?

2. May the district court issue an injunction based on an alleged violation of § 8(b)(4) of the Labor Management Relations Act where the NLRB has failed to show the illegality of the union's object?

3. May a district court, in a §10(1) proceeding, enjoin a union from protecting, by strikes or otherwise, its contractual right to work where repeated National Labor Relations Board precedents establish the union's right to strike in such circumstances?

TABLE OF CONTENTS OF BRIEF

Page

Questions Presented.

Jurisdictional Statement 1

Statement of the Case 2

A. The facts underlying this case 2

B. The proceedings below 3

Constitution and Statutes Involved

This case involves Sections 8(b)(4)(D) and 10(1) of the National Labor Relations Act and the Fifth Amendment to the United States Constitution. They are printed in Appendix A, *infra* 21

Statement of Points 8

Summary of Argument 8

Argument 10

I. The district court's refusal to allow cross-examination or oral testimony was erroneous 10

II. The regional director did not and could not offer any proof of an illegal "object" 16

III. Under applicable Board decisions Local 26 was exempt from 8(b)(4)(D) since it had a contractual right to the work 19

Conclusion 20

Appendix A 21

INDEX OF CITATIONS

CASES:

Carpenters' District Council v. *Cicci*, 261 F. 2d 5 (C.A. 6) 14, 18

Ensign v. *Pennsylvania*, 227 U.S. 597, 599, 57 L. Ed. 658, 662, 33 S. Ct. 321 .... 9, 12

General Electric Co. v. *American Wholesale*, 235 F. 2d 696 (C.A. 7) 14

Page

Greene v. *McElroy,* 360 U.S. 474, 496, 508 15
Hecht v. *Bowles,* 321 U.S. 321 11
Mayo v. *Lakeland Highlands Canning Co.,* 309 U.S. 310, 318-319 18
**McLeod* v. *Business Machine & Office Appliance Mechanics, etc.,* 300 F. 2d 237 (C.A. 2) 12, 20
**National Association of Broadcast Engineers,* 105 NLRB 355, 364 19
NLRB v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 71 S. Ct. 943, 95 L. Ed. 1284 17
NLRB v. *Radio Engineers (CBS),* 364 U.S. 573, 577 ....10, 19
NLRB v. *International Rice Milling Co.,* 341 U.S. 655, 71 S. Ct. 961, 95 L. Ed. 1277 16
Oklahoma Gas & Electric Co. v. *Bates Expanded Steel Truss Co.,* 296 Fed. 281 (D.C. Del.) 12
**Penello* v. *Local Union No. 59, Sheet Metal Workers International Assoc.,* 195 F. Supp. 458 (D.C. Del.) 13
Ross-Whitney Corp. v. *Smith Kline & French Lab.,* 207 F. 2d 190 (C.A. 9) 14
**Seafarers International Union* v. *NLRB,* 105 App. D.C. 211, 265 F. 2d 585 ....9, 16, 18
Sharaiha v. *Hoy,* 169 F. Supp. 598, 601 (D.C. S.D. Cal.) 12
Sims v. *Greene,* 161 F. 2d 87 (C.A. 3) 9, 13
Vincent v. *Operating Engineers, Local 106,* 207 F. Supp. 414, 50 LRRM 2879, 2880 (D.C. N.D. N.Y.) .. 12

STATUTE:

National Labor Relations Act, as amended (61 Stat. 146, 29 U.S.C. § 151, *et seq.*):

Section 8(b)(4)(ii)(B) 3, 4, 8-10
Section 8(b)(4)(ii)(D) 3-5, 10, 16, 19, 20
Section 10(1) 4, 5, 8, 10-16

MISCELLANEOUS:

Frankfurter & Greene, The Labor Injunction 12

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* Cases chiefly relied upon are marked by asterisks.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,263

ELECTRICAL WORKERS LOCAL 26, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and its Business Agent ROBERT MCALWEE, *Appellants,*

v.

JOHN A. PENELLO, Regional Director of the Fifth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, *Appellee.*

On Appeal From the United States District Court For the District of Columbia

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal from the granting of an injunction by the District Court upon petition by the Regional Director for the Fifth Region of the National Labor Relations Board. The District Court had jurisdiction under Section 10(1) of the National Labor Relations Act, 61 Stat. 146, 29 U.S.C. § 160(1). This Court has jurisdiction of this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

A. The Facts Underlying This Case

Local 26, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization in Metropolitan Washington that represents construction electricians and is the bargaining representative for the construction employees of Foley-Ernst, an electrical subcontractor (J.A. 12). Foley-Ernst and Local 26 have entered into a collective bargaining agreement which provides that all electrical equipment and materials shall be installed by employees covered by said collective bargaining agreement. Foley-Ernst has no collective bargaining agreements with any other union (J.A. 12).

Foley-Ernst, by sub-contract from the McCloskey Company, the general contractor, has responsibility for the electrical work involved in the construction of the Additional House Office Building (J.A. 49). Members of Local 26, employed by Foley-Ernst, installed many electrical fixtures described as "luminous egg-crate ceilings" at the Additional House Office Building (J.A. 12). Members of Local 26 had done such work for Foley-Ernst as well as many other employers in the past (J.A. 12).

In the spring of 1963, Local 102, Sheet Metal Workers International Association, demanded that henceforth Foley-Ernst employ its members for the installation of luminous egg-crate ceilings at the Additional House Office Building. Foley-Ernst refused to accede to that demand (J.A. 5). Foley-Ernst has never had a collective bargaining agreement with Local 102, Sheet Metal Workers.

Local 102 then inaugurated a dispute proceeding with the National Joint Board for Settlement of Jurisdictional Disputes, Building and Construction Industry (hereinafter referred to as the "Joint Board"). The Joint Board was established by a number of unions and some employers to provide a forum for the settlement of jurisdictional disputes. After a hearing, at which Foley-Ernst was not present, the Joint Board declared that the work should be done by Sheet Metal Workers. Foley-Ernst refused on the ground that it was not legally bound by the Joint Board's decisions and that it (Foley-Ernst) wanted this work to be done by electricians. Subsequently, Foley-Ernst declared that its refusal to abide by the Joint Board's purported decision was based on the Joint Board's violation of its own rules and the consequent lack of procedural fairness (J.A. 20). Foley-Ernst noted that a representative of the Sheet Metal Workers' International Association had participated in the decision as a member of the Joint Board and that the Joint Board had failed to set forth the reasons for its decision (J.A. 20).

When Foley-Ernst ignored the Joint Board decision, Local 102 Sheet Metal Workers, went on strike. In late July and early August 1963, a series of meetings were held to resolve this impasse. The meetings were called by representatives of the general contractor, McCloskey & Company. Present were the representatives of Foley-Ernst's the electrical subcontractor, and Local 26, IBEW, the representative of Foley-Ernst's employees. Mr. Howard S. Cash attended as the representative of Local 102, Sheet Metal Workers. The details of the conversations at these meetings are in dispute, as are the details of an earlier telephone conversation between a McCloskey representative and Mr. McAlwee of Local 26. No agreements were reached, and the controversy remained unresolved until the institution of the present proceeding.

B. The Proceedings Below

In September 1963, McCloskey filed unfair labor practices charges with the National Labor Relations Board alleging that, by threats made during the meetings referred to above, Local 26 had violated Section 8(b)(4)(ii)(B) and (D) of the Act.

On October 3, 1963, John A. Penello, Regional Director of the Fifth Region of the National Labor Relations Board, filed a Petition for Injunction under Section 10(1) of the Act (29 U.S.C. § 160(1)) in the District Court for the District of Columbia. The Petitioner Regional Director asked that Local 26 be enjoined "pending final disposition of the matters herein pending before the Board" from (J.A. 7):

> (a) Threatening or causing any work stoppage or strike at the House of Representatives Office Building addition project in Washington, D. C., for the object of forcing or requiring McCloskey or any other person engaged in commerce or in an industry affecting commerce to cease using, selling, handling, transporting, or otherwise dealing in the products of Foley-Ernst, or to cease doing business with Foley-Ernst; or for the object of forcing Foley-Ernst to assign the work of installing luminous egg-crate ceiling, hangers, tees, cross tees and wall angles at said project to employees who are members of, or represented by, Respondent Local 26 rather than to employees who are members of, or represented by, Local 102 and who are not members of, or represented by, Respondent Local 26;
>
> (b) In any manner or by any means, threatening, coercing or restraining McCloskey, Foley-Ernst, or any other person engaged in commerce or in any industry affecting commerce, where an object is either of the objects set forth in subparagraph (a) above.

Pursuant to an order to show cause, a hearing on the injunction was held before the District Court (Holtzoff, J.). Counsel for the Regional Director contended that Mr. McAlwee, agent of Local 26, had, during the August meeting and in a subsequent phone call to Mr. James McCloskey of McCloskey & Co., made statements to both Foley-Ernst and McCloskey & Co., constituting illegal threats under Sections 8(b)(4)(ii)(B) and (D) (J.A. 30). He then indicated his intention to offer witnesses in support of these contentions (J.A. 32). The District Court thereupon stated that it would not hear any oral testimony but would rely only on affidavits (J.A. 32). No such affidavits had been introduced by the Regional Director (J.A. 32). Following oral argument, during which it became clear that there were factual controversies as to (1) whether Mr. McAlwee on behalf of Local 26 had threatened McCloskey and Foley-Ernst, and (2) whether those alleged threats were for the objects prohibited by the Act, counsel for the Regional Director asked for a continuance in order to file affidavits in support of his factual contentions (J.A. 41). Local 26 objected to the District Court's decision to proceed on affidavits, pointing to the provisions of 29 U.S.C. § 160(1) which give the opposing party the right to present relevant testimony. The District Court rejected this contention and ordered the Regional Director to proceed by affidavits.

In support of his factual contentions, the Regional Director then submitted affidavits by James McCloskey and Howard S. Cash (J.A. 14). He urged that the statement, attributed to Mr. McAlwee in the Cash affidavit, that "if the work was assigned to the sheet metal workers by Foley-Ernst there would be no electricians on the job" (J.A. 16) constituted an illegal threat to both Foley-Ernst and McCloskey under § 8(b)(4)(ii)(D). However, at no time in the oral argument did the Regional Director indicate what, if any, evidence he relied upon to show the illegal objective required for a finding of a violation under Section 8(b)(4)(ii)(D).

The affidavit of Bancroft Foley, Jr., representative of Foley-Ernst, declared that (J.A. 11):

> Foley-Ernst has in the past installed luminous egg-crate ceilings in the Washington area. At all times such work was performed by employees represented by Local 26, IBEW;
>
> By contract with McCloskey & Company, Foley-Ernst has agreed to do electrical work at the said Additional House Office Building;

> Foley-Ernst had assigned the work of installing luminous egg-crate ceilings on the Additional House Office Building to employees represented by Local 26, IBEW, and still desires that such employees perform such work. I believe that performance of such work by anyone other than trained electricians would be more costly to Foley-Ernst;
>
> I informed the National Labor Relations Board by telegram of September 30, 1963, that Foley-Ernst had assigned the work in question to electrical workers;
>
> I have never been threatened by any representative of Local 26 concerning this work, nor to my knowledge has any other individual associated with Foley-Ernst been so threatened by representatives of Local 26.

The District Court, relying upon this affidavit, informed counsel for Local 26 that it would not find any threat to Foley-Ernst, the employer. Therefore, Local 26 directed its argument to the only charge left in the case—that Local 26 had threatened *McCloskey* (who employs no electricians) with the object of forcing or requiring Foley-Ernst to assign the work to members of Local 26. Counsel for Local 26 argued that (in light of Foley-Ernst's position, as set forth in the affidavit of Bancroft T. Foley, Jr.) there was no support for this charge. Local 26 argued that, as the District Court had recognized, the position of Foley-Ernst meant that there was no need for Local 26 to exert any influence on Foley-Ernst and hence Local 26 could not have had an illegal "object" in these circumstances.

The District Court dismissed the charge that Local 26 had threatened Foley-Ernst, noting (J.A. 52):

> While the charge advanced by the Board is that such a threat has been made by the respondent both against McCloskey, the prime contractor, and Foley-Ernst, the subcontractor, there is not sufficient proof of any threat directed against the sub-contractor. Both the representative of the union and the sub-

> contractor expressly deny any such threat. None appears to have been necessary because Foley-Ernst, the subcontractor has indicated not only a desire but an intention to disregard the decision of the National Joint Board and to continue employing electricians on this particular task.

However, the District Court declared that there was support for the charge that Local 26 had threatened McCloskey (J.A. 52):

> It is otherwise, however, as to the threat to call an electricians' strike charged to have been directed to McCloskey, the prime contractor. Affidavits submitted in behalf of the Board indicate that a conference took place between representatives of the two unions, a representative of the prime contractor and a representative of the subcontractor. It further appears that during this meeting a telephone conversation took place with J. C. McCloskey at his office in Philadelphia, who was a Vice-President of McCloskey & Company. Affidavits submitted in behalf of the Board indicate that at that conference Mr. McAlwee, the representative of Local 26, stated that if the work assignment was changed from the electricians to the sheet metal workers there would be no electricians on the job.
>
> In a sense this statement is ambiguous. It might be just a prophecy. On the other hand, the persons participating in the conference were realists and they construed this statement as an intimation that a jurisdictional strike would be called if the work assignment was changed from the electricians to the sheet metal workers.
>
> An affidavit was submitted by Mr. McAlwee denying that he ever made any threat and likewise a representative of the sub-contractor denied that any threat was made.
>
> What constitutes a threat, of course, is often a matter of inference or interpretation. At best, there is a conflict. The fact of the conversation is not denied by McAlwee. He merely denies that he ever made a

> threat. As indicated before, it is not for the Court to resolve the conflict.
>
> The Court finds that the Regional Director had reasonable ground to believe that the charge just referred to was true.

The Court made no reference to the object of Local 26 in making this alleged threat.

Despite objections by Local 26, the District Court's injunction banned Local 26 from making threats to McCloskey *and any other person* (J.A. 47). This appeal is from the granting of that injunction.

STATEMENT OF POINTS

1. A district court may not in a proceeding under Section 10(1) of the Act enter an injunction without affording the respondent the opportunity to present witnesses and to cross-examine those who have given evidence against it.

2. An injunction based on an alleged violation of Section 8(b)(4) of the Act may not be entered in a 10(1) proceeding without evidence and without a finding that the union acted with an object prohibited by Section 8(b)(4).

3. No injunction based upon an alleged violation of 8(b)(4)(D) of the Act may be entered where the respondent union has a contractual right to the work in question.

SUMMARY OF ARGUMENT

1. The District Court erred in denying Local 26 the opportunity to offer oral evidence and to cross-examine the witnesses relied upon by the Regional Director. Section 10(1) of the National Labor Relations Act gives the opposing party, Local 26 here, the absolute right "to appear by counsel and present any relevant testimony." Congress clearly intended, by this provision, that the party opposing the Regional Director's request for an injunc-

tion be allowed (1) to present oral testimony, and (2) to cross-examine. For, otherwise, the right to present "relevant testimony" is meaningless. The very words of the statute establish the right to oral evidence since the Supreme Court has held that "testimony" means oral evidence. *Ensign* v. *Pennsylvania,* 227 U.S. 597, 599. Even in normal proceedings for preliminary injunctions in non-labor cases, the majority of federal courts have held that conflicting affidavits must be resolved by oral testimony. *Sims* v. *Greene,* 161 F. 2d 87 (C.A. 3). A preliminary injunction in labor disputes has a far greater impact than elsewhere. Congress was aware of this impact and, as the words employed in the statute establish, intended that the opposing party be afforded maximum procedural safeguards, including the right to present oral testimony and to cross-examine.

2. The District Court failed to find that Local 26 had an illegal object in making the alleged threats. Since, as this Court has held, the determining factor in a violation of § 8(b)(4) of the National Labor Relations Act is the "objective" or "intendment" of the union, the injunction was improper. *Seafarers International Union* v. *NLRB,* 105 App. D.C. 211, 265 F.2d 585. The Regional Director alleged that Local 26's object was "to force or require" its employer, Foley-Ernst, to assign the work to its members. However, the Regional Director proffered no evidence, and the District Court made no finding, that this was Local 26's object. Rather, the District Court found that Foley-Ernst "preferred to have the work done" by members of Local 26, and that Foley-Ernst had evidenced its intent that members of Local 26, who had always done the work, continue doing it. There was no need for Local 26 to "force or require" Foley-Ernst to do that which Foley-Ernst "preferred" to do. Just as in the *Seafarers* case, the concrete evidence negatived an objective on the part of Local 26 to force or require Foley-Ernst to do

anything and there was a complete lack of proof of the critical element required for a finding that Section 8(b)(4) has been violated.

3. Local 26 had a clear contractual right to the disputed work. The National Labor Relations Board has held, in a long line of decisions, that jurisdictional disputes in support of contract rights do not constitute violations of § 8 (b)(4)(D) and has so represented to the Supreme Court. *Labor Board* v. *Radio Engineers,* 364 U.S. 573, 577, n. 12. Since Local 26 had the right to strike in support of its contractual right, it could threaten such a strike without violating § 8(b)(4)(D). Thus, even if Local 26 had made the threats alleged to it, with the object alleged to it, there would be no violation of § 8(b)(4)(D). Where previous decisions of the National Labor Relations Board indicate that the Board will dismiss the complaint, the request for injunction by the Regional Director must be dismissed.

ARGUMENT

I. The District Court's Refusal to Allow Cross-Examination or Oral Testimony Was Erroneous

In the proceeding below, counsel for plaintiff Regional Director indicated his intention to offer witnesses to substantiate the allegations in the petition. The Regional Director had submitted no affidavits. However, the District Court refused to hear witnesses, stated that it would decide the case on affidavits, and granted the Regional Director additional time within which to file affidavits. Having previously informed the Court that there were critical fact issues, counsel for the defendant, at the first opportunity, objected to resolution of these issues by affidavit and demanded the right to present oral testimony and to cross-examine plaintiff's witnesses.

The District Court's reading of § 160(1) would render meaningless the opposing party's right to present "relevant testimony." Thus, the Court here rejected Local 26's request for testimony on the ground that (J.A. 54):

> If it was the function of the Court, however, to resolve the question of fact here and to determine the question of veracity, the Court would have been inclined to hear oral testimony, even of its own motion, because matters of credibility and veracity cannot be determined on affidavits; but all that the Court must do here and all that it is restricted to doing is to decide whether reasonable cause has been established, that is, reasonable and probable cause, and that can readily be done on the basis of affidavits.
>
> It is true that the statute under which this proceeding is brought authorizes parties to present any relevant testimony. Relevant testimony, however, may be presented by affidavit, by deposition or by witnesses testifying orally. The statute does not profess to limit the discretion of the Court in that respect.

If the Regional Director's burden is satisfied by such a mere one-sided showing through affidavits of "reasonable cause," any offer of "relevant testimony" by the opposing party would be futile.

Clearly, Congress did not intend so empty a right. The union's right to present "relevant testimony" means that some independent examination of the facts must be made by the District Court. That obligation to examine the facts cannot be met simply by reliance on the affidavits of the Regional Director. Where there is factual controversy, the right of the opposing party to present "relevant testimony" can be met only through oral evidence and cross-examination.

Indeed, the statutory requirement in § 160(1) that the court issue "such injunctive relief as it deems just and proper" demands such a procedure. The district court under § 160(1) is not intended to be and could not, constitutionally, be a mere rubber stamp for the Regional Director. See *Hecht* v. *Bowles,* 321 U.S. 321. In order for the injunction to be "just and proper," "the elements of the statute involved must have some reasonable support of direct proof or enough to permit sensible inference indicating improper conduct by the respondent . . ." *Vincent* v. *Operating Engineers, Local 106,* 207 F. Supp. 414, 50 LRRM 2879, 2880 (D.C. N.D. N.Y.); *McLeod* v. *Business Machine & Office Appliance Mechanics, etc.,* 300 F. 2d 237 (C.A. 2) (". . . the Regional Director must demonstrate some support, both factual and legal, for every element of his case.").

The very use of the word "testimony" in the statute shows that Congress intended that there be oral evidence and cross-examination in § 160(1) proceedings. As the Supreme Court has noted, "The word testimony more properly refers to oral evidence." *Ensign* v. *Pennsylvania,* 227 U.S. 597, 599, 57 L. Ed. 658, 662, 33 S. Ct. 321 (1912). This is the common meaning of the word and, in fact, was the understanding of counsel for the Regional Director, who was prepared to present his witnesses for examination and cross-examination. The District Court, too, prior to its interpretation of the statute, used the word "testimony" to mean "oral testimony" (J.A. 32). See also, *Sharaiha* v. *Hoy,* 169 F. Supp. 598, 601 (D.C. S.D. Cal.) (". . . the word *testimony,* technically construed, refers solely to the *oral* utterances of *witnesses* under oath, and in interpreting statutes, words having a technical meaning are to be so construed"); *Oklahoma Gas & Electric Co.* v. *Bates Expanded Steel Truss Co.,* 296 Fed. 281 (D.C. Del., 1924).

The congressional concern for procedural fairness in § 160(1) proceedings, thus manifested by the very words of the statute, stems from the nature of the relief sought. A fair opportunity to be heard is critical in § 160(1) proceedings since the § 160(1) injunction, though preliminary, may very well end the controversy. Cf. Frankfurter & Greene, *The Labor Injunction.* Once the union is enjoined, its cause is often lost; so that the subsequent dismissal of the complaint by the National Labor Relations Board a year or two later is meaningless. Congress was sharply aware of these realities and therefore hedged the unusual judicial power of § 160(1) with adequate procedural protection for the charged union.

In *Penello* v. *Local Union No. 59, Sheet Metal Workers International Assn.*, 195 F. Supp. 458 (D.C. Del.), the only case construing this sentence of the statute, the court recognized that so extreme a remedy as that afforded by § 160(1) must be supported by "credible" evidence. Chief Judge Wright held:

> That the judicial function is to be exercised in § 10 (1) cases appears plainly enough on the face of that section, *for the respondent is given an absolute right to present oral testimony on his behalf*" (emphasis supplied).

Even in non-labor cases, appellate courts have frowned on the exclusive use of affidavits in preliminary injunction proceedings. In *Sims* v. *Greene*, 161 F. 2d 87 (C.A. 3), Judge Biggs held that in cases where the evidence is conflicting, the trial court should not rely on affidavits—

> . . . The preliminary injunction was issued on the identical record which was before this court on the prior appeal. The allegations of the pleadings and affidavits filed in the cause are conflicting. Such conflicts must be resolved by oral testimony since only by hearing the witnesses and observing their demeanor on the stand can the trier of fact determine the veracity of the allegations made by the respective parties. If witnesses are not heard the trial court will be left in the position of preferring one piece of paper to another. Greene [the defendant] was given no opportunity to present oral testimony on his behalf except for one witness whose testimony was immaterial to any issue presented by the pleading. . . . Questions asked by counsel are not evidence. The truth of the matter is that Greene was given no fair opportunity to present testimony prior to the issuance of the preliminary injunction.

> . . . Rule 65(a) provides that no preliminary injunction shall be issued without notice to the adverse party. Notice implies an opportunity to be heard. Hearing requires trial of an issue or issues of fact. Trial of an issue of fact necessitates opportunity to present evidence and not by only one side to the controversy. It should be pointed out also that subsection (b) of Rule 65 provides that a motion, for a preliminary injunction "shall be set down for *hearing* * * *" and speaks of the motion coming on for "hearing."
>
> * * * *
>
> If anything more was required to indicate with certainty that a preliminary injunction may not issue without giving the party sought to be enjoined an opportunity to present evidence on his behalf, it is furnished by the provisions of Rule 52(a) which requires the court, in all actions "tried upon the facts without a jury" to state separately its conclusions of law and "in granting or refusing interlocutory injunctions" "similarly [to] set forth the findings of fact and conclusions of law which constitute the grounds of its action." The conclusion is inescapable that since a district court is required by the rule to make findings of fact, the findings must be based on something more than a one-sided presentation of the evidence.

See also, *General Electric Co.* v. *American Wholesale,* 235 F.2d 606 (C.A. 7); cited with approval in *Carpenters' District Council* v. *Cicci,* 261 F. 2d 5 (C.A. 6); *contra: Ross-Whitney Corp.* v. *Smith Kline & French Lab.,* 207 F. 2d 190 (C.A. 9).

In view of the devastating effect of a § 160(1) injunction on a labor controversy, there are even stronger reasons for cross-examination in these proceedings. Moreover, the court does not retain total control over a § 160 (1) action; its role is essentially ended upon the granting of the injunction. The protections afforded the usual defendant are, therefore, not available here. Thus, in a normal proceeding, the availability of discovery permits the enjoined party to develop facts that would lead to dissolution of the injunction. Additionally, the financial protections afforded the defendant by the bond requirement in the ordinary preliminary injunction proceeding is not available in a § 160(1) case.

Finally, § 160(1) must be read to require cross-examination where the defendant demands it in order to avoid substantial constitutional questions. Neither a court nor an administrative agency can abridge substantial rights without affording the injured party the right to cross-examine. In *Greene* v. *McElroy,* 360 U.S. 474, 496, the Supreme Court said—

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots.
>
> * * * *
>
> Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process [citing cases] . . . These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition. 360 U.S. at 508.

So severe a restriction on fundamental liberties as is involved in this case cannot constitutionally be grounded on simple affidavits. Constitutional fairness requires that the defendant be afforded the opportunity to cross-examine the parties whose assertions form the basis for the § 160 (1) injunction.

Critical factual questions were presented. Was there a threat? What was its object? Bancroft Foley, Jr., the employer's representative said there was no threat (J.A. 12). The representative of Local 26 denied making any threats (J.A. 14). The court noted that the statement attributed to the Local 26 representative was "ambiguous." Although decrying any responsibility to resolve such questions of fact, the District Court did make extensive findings (see J.A. 52). It found, without benefit of any evidence in support thereof, that ". . . the persons participating in the conference were realists and they construed this statement as an intimation that a jurisdictional strike would be called if the work assignment was changed from the electricians to the sheet metal workers" (J.A. 52). As we have illustrated above, such factual findings cannot, under § 160(1), be made by preferring one paper affidavit to another.

The statutory language, the general judicial practice and fundamental constitutional considerations all require that § 160(1) be interpreted to afford the defendant the right (1) to cross-examine the regional director's witnesses, and (2) to offer oral testimony on his own behalf. Their denial here was erroneous and this case must therefore be reversed.

II. The Regional Director Did Not and Could Not Offer Any Proof of an Illegal "Object"

An essential statutory prerequisite for a finding of an unfair labor practice under § 8(b)(4)(D) of the National Labor Relations Act is "an object" of ". . . forcing or requiring any employer to assign particular work to employees in a particular trade . . ." As this Court has recognized, "the determining factor is the objective, the intendment, of the strike." *Seafarers Union* v. *NLRB,* 105 App. D.C. 211, 216, 265 F. 2d 585, 590, citing, *inter alia, NLRB* v. *International Rice Milling Co.,* 341 U.S. 665, 71

S. Ct. 961, 95 L. Ed. 1277; *NLRB* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 71 S. Ct. 943, 95 L. Ed. 1284.

The Regional Director claimed that the illegal "object" of the supposed threat to McCloskey was "to force or require Foley-Ernst to assign the work of installing luminous egg-crate ceiling . . . to employees who are members of, or represented by, Respondent Local 26" (Compl. J.A. 6). There is simply no shred of evidence to support the allegation that the supposed threat to McCloskey had such an object. Since Foley-Ernst had consistently stated that it would assign the work to members of Local 26, there was no need whatsoever for Local 26 to seek to "force or require" Foley-Ernst to do anything. To attribute that "object" to Local 26 defies both logic and human experience.

Indeed, the very complaint recites that, "At all times material herein Foley-Ernst has assigned the work . . . to . . . members of . . . Respondent Local 26 . . ." (Compl., J.A. 5). Also, that, "Foley-Ernst has refused to accede to said [the Sheet Metal Workers'] demand" (Compl., J.A. 5). Judge Holtzoff, in his opinion, noted that, ". . . the electricians were not willing to acquiesce in this decision and *neither was Foley-Ernst because Foley-Ernst preferred to continue to have the work done by electricians for some reasons best known to itself*" ((emphasis supplied) J.A. 49). Later, Judge Holtzoff, noting that there was no proof of a threat by the defendant against Foley-Ernst, the subcontractor, stated, "[No threat] appears to have been necessary because Foley-Ernst, the subcontractor, *has indicated not only a desire but an intention to* disregard the decision of the National Joint Board and *to continue employing electricians* on this particular task" (emphasis supplied).

Where, then, is there any indication whatever that the defendant had as its objective, in its supposed threat to McCloskey, "to force or require Foley-Ernst to assign the work of installing luminous egg-crate ceiling . . ." to its members? Judge Prettyman, in the *Seafarers* case, *supra,* stated:

> In the absence of admissions by the union of an illegal intent, the nature of acts performed shows the intent. All the concrete evidence negatives an objective on the part of the Seafarers Union to force or require Todd to do anything.

Here, too, "all the concrete evidence negatives an objective" on the part of the union to force or require Foley-Ernst to do anything.

That the trial court totally disregarded the statutory requirement that there be an illegal "object" is clear from the fact that its opinion never refers to the defendant's object. The omission of so critical a factual finding is in itself grounds for reversal. See FRCP 52(a) (. . . in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action); *Mayo* v. *Lakeland Highlands Canning Co.,* 309 U.S. 310, 318-319; *Carpenters' District Council* v. *Cicci,* 261 F. 2d 5 (C.A. 6).

If the trial court had discussed the "object," the manner in which the "concrete evidence negative[d]" the illegal objective would have been glaringly apparent. The court below first noted that it was totally unnecessary for the appellant to threaten Foley-Ernst. However, it then found that the appellant had threatened McCloskey, presumably with the object of "forcing or requiring" Foley-Ernst. Why would the union threaten McCloskey rather than threatening Foley-Ernst if its "object" was to force Foley-Ernst to assign it the work. If it was not "necessary" to threaten Foley-Ernst then surely any threat to McCloskey was not intended to bring pressure on Foley-Ernst.

Here, as in *Seafarers,* the failure of any proof of an illegal objective requires reversal.

III. Under Applicable Board Decisions Local 26 Was Exempt From 8(b)(4)(D) Since it had a Contractual Right to the Work

Moreover, were we to assume, contrary to the facts and to reason, that Local 26 threatened McCloskey, with the object of forcing Foley-Ernst to assign the work to its members, there would be no violation of Section 8(b)(4)(D) since Local 26 had a contractual right to do the work. As noted by the Supreme Court in *Labor Board* v. *Radio Engineers (CBS),* 364 U.S. 573, ". . . the Board has adopted the position that jurisdictional strikes in support of contract rights do not constitute violations of § 8(b)(4)(D) despite the fact that the language of that section contains no provision for special treatment of such strikes." 364 U.S. at 577, n. 12. See also, *National Association of Broadcast Engineers,* 105 NLRB 355, 364 (to fail to hold as controlling . . . the contractual preemption of the work in dispute would be to encourage disregard for observance of binding obligations under collective-bargaining agreements and invite the very jurisdictional disputes Section 8(b)(4)(D) is intended to prevent"); *Local 173, Wood, Wire and Metal Lathers,* 121 NLRB 1094, 1107-1108.

Local 26 at all times has had a valid collective bargaining agreement with Foley-Ernst providing that "all electrical equipment shall be installed" by members of Local 26. The work in question clearly fits within that definition. To belabor the obvious, the very fact that Foley-Ernst had responsibility for this work is conclusive of the question since Foley-Ernst had contracted with McCloskey to do only "Electrical Work" (Affidavit of B. T. Foley, Jr., J.A. 12). Since the Sheet Metal Workers have no contract with Foley-Ernst, it cannot be claimed that Foley-Ernst has in fact assigned the work to two different unions.

Clearly, therefore, under repeated Board decisions, since Local 26 would have had the right to strike to enforce this contractual right without violating Section 8(b)(4)(D), it could, without violating the statute, have threatened such a strike.

Where repeated decisions of the National Labor Relations Board indicate that a complaint will be dismissed, the district court should deny a request for a § 160(1) injunction. *McLeod* v. *Business Machine & Office Appliance Mechanics Conference Board,* 300 F. 2d 237 (C.A. 2). As Judge Marshall indicated in the *McLeod* case, the District Court should be especially mindful of obeying Board precedent in the light of the separation of functions between the National Labor Relations Board and its General Counsel. Here a consistent line of Board decisions makes clear the argument of Local 26 that its contractual right to the work renders § 8(b)(4)(D) inapplicable. The District Court's issuance of an injunction was therefore improper.

CONCLUSION

For the reasons stated, the decision of the court below should be reversed.

Respectfully submitted,

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January 1964.

APPENDIX A

Constitutional and Statutory Provisions Involved

Amendment V. No person shall be * * * deprived of life, liberty, or property, without due process of law.

National Labor Relations Act (61 Stat. 146, 29 U.S.C. § 160(1)).

> Sec. 8 (b). It shall be an unfair labor practice for a labor organization or its agents—
>
> (4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> * * *
>
> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:
>
> * * *
>
> Sec. 10 (1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia * * * for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief

or temporary restraining order as it deems just and proper, notwithstanding any other provision of law * * *. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony * * *. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,263

ELECTRICAL WORKERS LOCAL 26, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO;
and its Business Representative, ROBERT
McALWEE, APPELLANTS

v.

JOHN A. PENELLO, Regional Director of the
Fifth Region of the National Labor Relations
Board, for and on behalf of the NATIONAL
LABOR RELATIONS BOARD, APPELLEE

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
GRANTING INJUNCTIVE RELIEF UNDER SECTION 10(1)
OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

FILED

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I N D E X

Page

Questions presented . . . . (I)

Counterstatement of the case 1
  A. The proceedings below 1
  B. The facts established by the affidavits of the parties 4
  C. The decision of the District Court 6

Summary of Argument 9

Argument 11
  I. Introduction: The statutory scheme pursuant to which the District Court granted relief . . . . .

  II. The District Court properly found reasonable cause to believe that appellants violated Section 8(b)(4)(ii)(D) of the Act 13

  III. The District Court acted within the scope of its discretion in deciding the instant case on the affidavits submitted by the parties 17
    A. Introduction 17
    B. Section 10(1) does not require that a party against whom injunctive relief is sought be given an opportunity to present oral testimony 18

Conclusion 24

Appendix A 25

AUTHORITIES CITED

Cases:

* Acoustical Cont. Assoc. of Cleveland, 119 NLRB 1345 17

American Federation of Radio & Television Artists v. Getreu, 258 F. 2d 698 (C.A. 6) 12

Cuneo v. Local No. 825, Int. Un. of Operating Engineers, etc. & Local No. 472, 300 F. 2d 832 (C.A. 3) 12

Cuneo, etc. v. Local 825, Int. Un. of Operating Engineers, 306 F. 2d 394 (C.A. 3) 12

Page

* Federal Trade Commission v. Rhodes Pharmacal Co., 191 F. 2d 744 . . . . . 21, 22

Federal Trade Commission v. Thomsen-King & Co., 109 F. 2d 516 (C.A. 7) 21

Gibbs v. Buck, 307 U.S. 66 22

Hoffritz v. U.S., 240 F. 2d 109 (C.A. 9) 22

A.W. Lee, Inc., 113 NLRB 947 17

Madden v. Int'l Hod Carriers, 277 F. 2d 688 (C.A. 7), certiorari denied, 364 U.S. 863 12

Madden v. Int'l Organization of Masters & Pilots, Inc., 259 F. 2d 312 (C.A. 7) 12

Matson Navigation Co., 140 NLRB 449 17

N.L.R.B. v. Highway Truckdrivers & Helpers, Local 107, 300 F. 2d 317 (C.A. 3) 14

N.L.R.B. v. Int'l Hod Carriers, Local No. 1140, 285 F. 2d 397 (C.A. 8), cert. den., 366 U.S. 903 14

N.L.R.B. v. Local 825, Int'l Union of Operating Engineers, 315 F. 2d 695 (C.A. 3) 14

N.L.R.B. v. Plumbers Union of Nassau County, Local 457, 299 F. 2d 497 (C.A. 2) 14

*N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, 364 U.S. 573 17

N.L.R.B. v. United Assoc. of Journeymen, Local 12, 320 F. 2d 250 (C.A. 1) 14

Ohio Oil Co. v. Conway, 279 U.S. 813 22

Pang-Tsu Mow v. Republic of China, 91 U.S. App. D.C. 324, 201 F. 2d 195, cert. den., 345 U.S. 925 22

Penello V. Local Union No. 59, 195 F. Supp. 558 (D.C. Del.) 24

Retail, Wholesale & Dept. Store Union, AFL-CIO v. Rains, 266 F. 2d 503 (C.A. 5) 12

Page

Ross-Whitney Corp. v. Smith, Kline & French Lab., 207 F. 2d 190 (C.A. 9) . . . 22

Schauffler v. Highway Truck Drivers & Helpers, 230 F. 2d 7 (C.A. 3) . . . 12

*Schauffler v. Local 1291, Int'l Longshoremen's Ass'n, 292 F. 2d 182 (C.A. 3) . . . 12, 21

S.E.C. v. Johns, 207 F. Supp. 566 (D. N.J.) . . . 21

Sims v. Greene, 161 F. 2d 87 (C.A. 3) . . . 17

Roy Stone Transfer Corp., 99 NLRB 662 . . . 17

Wm. F. Traylor, 97 NLRB 1003 . . . 17

U.S. v. Hughes, 28 F. Supp. 977 (D. E.D. Wash.) . . . 21

U.S. v. Wilson Williams, Inc., 277 F. 2d 535 (C.A. 7) . . . 17

Union Carbide Chemical Co., 137 NLRB 750 . . . 17

Warehousemen's Union Local 6 v. Hoffman, 302 F. 2d 352 (C.A. 9) . . . 12

Miscellaneous:
- 3 Barren & Holtzeff, Federal Practice and Procedure (Rev. Ed., 1956) . . . 22
- 7 Moore, Federal Practice (2d Ed., 1955) . . . 22

STATUTE

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, _et seq._) . . . 1
- Section 8(b)(4)(ii)(B) . . . 2, 8
- Section 8(b)(4)(ii)(D) . . . 2, 8, 13,16
- Section 8(b)(4)(D) . . . 9, 17,24
- Section 10(e) . . . 12
- Section 10(f) . . . 12
- Section 10(h) . . . 20
- Section 10(k) . . . 16

Norris-LaGuardia Act (47 Stat. 71, 29 U.S.C. Sec. 101 _et. seq._) . . . 19
- Section 7 . . . 10, 19

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* Authorities chiefly relied upon.

QUESTIONS PRESENTED

In the opinion of appellee, the questions are:

1. Whether the District Court properly found reasonable cause to believe that appellants violated Section 8(b)(4)(ii)(D) of the National Labor Relations Act.

2. Whether the District Court properly concluded that the right of a party against whom injunctive relief is sought under Section 10(l) of the National Labor Relations Act to present "relevant testimony" does not require, as a prerequisite to granting such relief, that an opportunity be afforded that party to present oral testimony and to cross-examine the Regional Director's witnesses.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,263

ELECTRICAL WORKERS LOCAL 26, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO;
and its Business Representative, ROBERT
McALWEE, APPELLANTS

v.

JOHN A. PENELLO, Regional Director of the
Fifth Region of the National Labor Relations
Board, for and on behalf of the NATIONAL
LABOR RELATIONS BOARD, APPELLEE

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
GRANTING INJUNCTIVE RELIEF UNDER SECTION 10(1)
OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A. The proceedings below

This is an appeal from an order (J.A. 46-47)[1] of the United States District Court for the District of Columbia, granting an injunction on a petition therefor filed on behalf of the National Labor Relations Board by appellee John A. Penello, Regional Director for the Fifth Region of the Board, pursuant to the provisions of Section 10(1) of the National Labor Relations Act, as amended (61 Stat. 149, 73 Stat. 544, 29 U.S.C. Sec. 151 *et seq*.).[2]

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[1] "J.A." references are to the Joint Appendix filed by the parties.

[2] The relevant portions of the Act are printed as Appendix A to appellants' brief and as Appendix A to this brief (p. 25 , *infra*).

The Regional Director's petition for an injunction, filed with the court below on October 3, 1963 (J.A. 2-9), was predicated upon charges filed with the Regional Director on September 6 and September 30, 1963, by McCloskey & Co. (herein called McCloskey), alleging that appellants, Electrical Workers Local 26, International Brotherhood of Electrical Workers, AFL-CIO (herein occasionally referred to as Electrical Workers), and Robert McAlwee, business representative of the Electrical Workers, had engaged in, and were engaging in unfair labor practices proscribed by Section 8(b)(4)(ii) (B) and (D) of the Act. After investigation, the Regional Director concluded that there was reasonable cause to believe that the charges were true, and that a complaint by the General Counsel of the Board should issue (J.A. 3). Accordingly, as required by Section 10(l) of the Act, the Regional Director filed a petition for injunctive relief against the continuance of the conduct set out in the charges pending final adjudication by the Board.

Upon this petition, which was verified by the Regional Director (J.A. 8-9), the court below issued an Order to Show Cause on October 3, 1963, directing, inter alia, that appellants appear before the court and show cause why a temporary injunction should not be entered as prayed for in the petition (J.A. 9-10). On October 23, 1963, the date of the hearing on the Regional Director's petition, appellants who had not filed an answer to the petition, filed a motion to dismiss the petition, with supporting affidavits (J.A. 11, 33). At the hearing, after counsel for the Regional Director had stated his case (J.A. 27-32), he was asked by the court for affidavits to support his contention that appellants had engaged in the unfair labor practices with which they had been charged (J.A. 32-33). When counsel for the Regional Director indicated that he did not have any affidavits, but was prepared to present the testimony of witnesses to support the factual allegations of the petition, the court stated that it did not want to hear oral testimony, but preferred that affidavits be submitted (J.A. 32-33). At this point, counsel for appellants, after some colloquy with the court, asserted that in light of the affidavits submitted by appellants, and in the absence of any affidavits submitted by the Regional Director, there was nothing before the court to support the "critical allegation . . . that respondent Robert McAlwee on or about August 9 and on or about August 13 threatened McCloskey and Foley-Ernst" (J.A. 38, 36-39). Counsel for the Regional Director then offered to present affidavits, and the court adjourned proceedings "for a few days in order to enable affidavits to be submitted" (J.A. 42). In explaining its decision in this respect the court stated (J.A. 41):

> Under the rules it is discretionary with the Court to take oral testimony or to determine motions for preliminary injunctions on affidavits. Our usual practice here is to determine those matters on affidavits. We have to do that, except in exceptional instances, because of the volume of our business. If I devoted a day to taking oral testimony, what would happen to all the other motions that are waiting to be heard? A country court or a court in a small town, where they have a case set for today and another one for next week, they can afford the time.
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> * * * *
>
> I want to say this, gentlemen: this is a matter that is peculiarly appropriate to be determined on affidavits because I would not make any findings of fact as to whether a threat was made or not. That is for the Board to determine. All I have to determine is whether there is probable cause for an injunction, a preliminary injunction pending the decision of the Board. . . .

B. The facts established by the affidavits of the parties

Subsequently, affidavits and exhibits were filed in support of the Regional Director's petition (J.A. 14-20), and in opposition (J.A. 20-27). The facts of the case, as established by the affidavits, are these:

McCloskey is engaged at Washington, D.C., as general contractor in the construction of the Additional House Office Building for the House of Representatives of the Congress of the United States (J.A. 17). In the performance of this contract, McCloskey subcontracted all of the electrical work to Foley-Ernst, a joint venture composed of Howard P. Foley Co. and E.C. Ernst, Inc. (J.A. 11, 18). The contract between McCloskey and Foley-Ernst provided, inter alia, that the latter would furnish and install "luminous egg crate ceilings, with the necessary hangers, tees, cross tees and wall angles" (J.A. 12, 26).[3] Foley-Ernst, in turn, assigned the work of installing the egg crate ceilings to employees represented by the Electrical Workers, with whom Foley-Ernst has a collective bargaining agreement providing, inter alia, that "all electrical equipment and materials shall be installed by employees covered by this contract . . ." (J.A. 12).

In the spring of 1963, Local 102, Sheet Metal Workers International Association, AFL-CIO (herein called the Sheet Metal Workers), demanded that Foley-Ernst employ its members to perform the aforementioned work (J.A. 15). When Foley-Ernst refused, Local 102 submitted the dispute to the National Joint Board for Settlement of

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[3] An "egg crate ceiling" is a suspended ceiling constructed of sheet metal, having the appearance of egg crate boxes, through which light is diffused (J.A. 28).

Jurisdictional Disputes, Building and Construction Industry (herein called the Joint Board).[4] Thereafter, on July 20, 1963, the Joint Board determined that "the work in dispute shall be assigned to sheet metal workers" (J.A. 19-20). Foley-Ernst, however, refused to comply with the award of the Joint Board (J.A. 12, 14, 16-17).

On August 13, 1963, a meeting was held at the building site in an attempt to resolve the continuing dispute as to who should perform the work in question--Sheet Metal Workers or Electrical Workers. Present at the meeting were Howard S. Cash, business manager of the Sheet Metal Workers; Alfred F. Yates, business representative of the Sheet Metal Workers; William J. Ryan, project manager for McCloskey; Bancroft T. Foley, Jr., a representative of Foley-Ernst; M.C. McMahon, a project superintendent for Foley-Ernst; and Robert McAlwee, business manager of the Electrical Workers (J.A. 14-15).

At this meeting Cash insisted that the disputed work should be assigned immediately to the Sheet Metal Workers in accordance with the award of the Joint Board. McAlwee, in turn, insisted that the work remain with the Electrical Workers, claiming that the Joint Board award applied only to "independently hung" ceilings and that the ceilings in question were not "independently hung" (J.A. 15). William T. Ryan, McCloskey's project manager, then telephoned James C. McCloskey, vice president of McCloskey & Co. (J.A. 17), who stated to Cash that the Joint Board's determination should be complied with. McCloskey then spoke with Bancroft T. Foley, Jr., the latter indicating that his company,

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[4] The Joint Board was established by the AFL-CIO for the settlement of jurisdictional disputes in the building and construction industry (J.A. 29).

Foley-Ernst, wanted to complete one partially finished room (presumably before complying with the Joint Board award). Upon hearing this statement, Cash renewed his demand that the Joint Board award be complied with immediately (J.A. 16). At this point, appellant McAlwee stated that the Electrical Workers would not abide by the decision of the Joint Board (J.A. 17), and that "if the work assignment was changed from the Electricians to the Sheet Metal Workers, . . . there would be no electricians on the job" (J.A. 16, 17-18).[5/]

Subsequent to the meeting of August 13, which had not resulted in a resolution of the dispute, Foley-Ernst requested the Joint Board to clarify its decision of July 20, 1963, particularly with reference to the term "independently hung" ceilings. In reply, the Joint Board, on August 22, 1963, clarified its prior decision by deleting the words "independently hung" and reaffirming the assignment of the disputed work to the Sheet Metal Workers (J.A. 16, 26). Despite this clarification, Foley-Ernst refused to assign the work in question to Sheet Metal Workers (J.A. 16-17, 18). None of the disputed work has been performed since about September 4, 1963 (J.A. 18).

C. The decision of the District Court

On the basis of the foregoing facts, the District Court concluded that the Regional Director had reasonable cause to believe that the charge alleging an unlawful threat to McCloskey (although not to Foley-Ernst) was true. The Court stated (J.A. 52-53):

[5/] McAlwee did not deny having made the above statement, but merely asserted generally that he did not "threaten" McCloskey with a work stoppage at the August 13 meeting (J.A. 13).

> Affidavits submitted in behalf of the Board indicate that a conference took place between representatives of the two unions, a representative of the prime contractor and a representative of the sub-contractor. It further appears that during this meeting a telephone conversation took place with J.C. McCloskey at his office in Philadelphia. He was a Vice-President of McCloskey & Company. Affidavits submitted in behalf of the Board indicate that at that conference Mr. McAlwee, the representative of Local 26, stated that if the work assignment was changed from the electricians to the sheet metal workers there would be no electricians on the job.
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> In a sense this statement is ambiguous. It might be just a prophesy. On the other hand, the persons participating in the conference were realists and they construed this statement as an intimation that jurisdictional strike would be called if the work assignment was changed from the electricians to the sheet metal workers. An affidavit was submitted by Mr. McAlwee denying that he ever made any threat and likewise a representative of the sub-contractor denied that any threat was made.
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> What constitutes a threat, of course, is often a matter of inference or interpretation. At best, there is a conflict. The fact of the conversation is not denied by McAlwee. He merely denies that he ever made a threat. As indicated before, it is not for the Court to resolve the conflict.
>
> The Court finds that the Regional Director had reasonable ground to believe that the charge just referred to was true.

With respect to appellants' contention that the court was without power to grant an injunction under Section 10(l) of the Act without allowing appellants an opportunity to present oral testimony, the court stated (J.A. 53-54):

> At one time in the course of the argument the respondents' counsel asked leave to supplement his affidavits by oral testimony which the Court deemed unnecessary. Rule 43(e) of the Federal Rules of Civil Procedure provides that:

> "Where a motion is based on facts not appearing of record the Court may hear the matter on affidavits presented by the respective parties, but the Court may direct that the matter be heard wholly or partly on oral testimony or depositions."
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> In other words, the more usual practice is to hear motions on affidavits, although the Court in its discretion may take oral testimony. Ordinarily in this Court the practice is to hear motions on affidavits and it is the exception to take oral testimony. It would be very burdensome indeed if oral testimony was heard on a great many motions because this Court is so busy that it frequently has to hear and determine 10 to 15 motions a day.
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> If it was the function of the Court, however, to resolve the questions of fact and to determine a question of veracity, the Court would have been inclined to hear oral testimony, even of its own motion, because matters of credibility and veracity cannot be easily determined on affidavits. All that the Court must do here, however, and all that it is restricted to doing is to decide whether reasonable cause has been established, that is, reasonable and probable cause, and that can readily be done on the basis of affidavits. It is true that the statute under which this proceeding is brought authorizes parties to present any relevant testimony. Relevant testimony, however, may be presented by affidavit, by deposition, or by witnesses testifying orally. The statute does not profess to limit the discretion of the Court in that respect.

Having found that the Regional Director had reasonable cause to believe that the charge alleging an unlawful threat to McCloskey was true, and that appellants' defenses to the petition for injunctive relief were without merit, the court concluded that the injunction prayed for should be issued (J.A. 53, 46-47).[6]

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[6] The injunction was, however, limited to violations of Section 8(b)(4)(ii)(D) of the Act, the court having found no reasonable cause to believe appellants had violated Section 8(b)(4)(ii)(B) (J.A. 48). Inasmuch as the relief granted--an injunction against threatening or causing a work stoppage or strike--was adequate to preserve the entire case for orderly disposition by the Board, the Regional Director has not filed a cross-appeal from the partial denial of the relief originally sought by him.

SUMMARY OF ARGUMENT

1. The issue before a district court in a proceeding to obtain injunctive relief pursuant to Section 10(l) of the Act is whether there exists reasonable cause to believe that a violation of the Act has occurred. In the instant case, it was undenied that after McCloskey, the general contractor, had said that Foley-Ernst should comply with the Joint Board's award of the disputed work to Sheet Metal Workers, appellant McAlwee stated, at a meeting attended by representatives of McCloskey and Foley-Ernst, that if Foley-Ernst assigned the disputed work to Sheet Metal Workers, "there would be no electricians on the job." That the District Court could reasonably infer that this statement implied a threat of a work stoppage, with the unlawful objective of forcing Foley-Ernst to assign the work in question to Electrical Workers, hardly requires discussion.

And, while appellants argue that Electrical Workers had a contractual right to the disputed work, the law is clear that such a "right" is no defense to a violation of Section 8(b)(4)(D) where, as here, all parties have submitted the work assignment dispute to the Joint Board for resolution.

2. While it is the general practice of the Board's Regional Directors, in seeking injunctive relief under Section 10(l), to present the testimony of witnesses in open court, with opportunity for cross-examination, and the introduction of oral testimony by the party against whom injunctive relief is sought, we have no doubt that a district court may, in the exercise of its discretion, choose to hear such a

proceeding on affidavits alone. Initially, Section 10(l) gives parties to such a proceeding the right to present "relevant testimony," not "oral testimony." Furthermore, if Congress had intended to impose a requirement that injunctive relief under Section 10(l) be predicated only on oral testimony of witnesses in open court, with opportunity for cross-examination, and the introduction of oral testimony by the party against whom relief was sought, it would have done so. Thus, Section 7 of the Norris-LaGuardia Act provides the very limitation on the grant of injunctive relief which appellants would here apply to proceedings under the Labor Act. When Section 10(l) was being debated in the Senate, however, a proposal to make Section 7 of the Norris-LaGuardia Act applicable to suits for injunctive relief under Section 10(l) was explicitly rejected.

Furthermore, the standard for granting injunctive relief under Section 10(l)--whether there is reasonable cause to believe that a violation of the Act has occurred--militates against appellants' argument that the introduction of oral testimony is a statutory prerequisite to the grant of injunctive relief. Oral testimony may be useful to resolve disputed issues of fact presented by the pleadings and affidavits; it is plainly not necessary where the district court is under no obligation to resolve such disputes,but merely to determine whether reasonable cause exists for believing a violation of the Act has occurred. Nor, contrary to appellants' assertions, does this interpretation of Section 10(l) render meaningless the right to present "relevant testimony" in opposition to the injunction. It is not at all inconceivable that affidavit evidence could be introduced that would show that there was no reasonable cause to believe that the Act had been violated.

Finally, even if Section 10(l) were read, as appellants assert it should be, to require that a party against whom injunctive relief is sought must be afforded an opportunity to adduce "relevant [oral] testimony," appellants have wholly failed to show what oral testimony they would have or could have adduced that would have been relevant to the question before the District Court, i.e., whether the Regional Director could reasonably infer a threat with the objective of forcing Foley-Ernst to assign the disputed work to Electrical Workers from McAlwee's undenied statement to McCloskey that if the work were assigned to Sheet Metal Workers, there would be no Electricians on the job. Thus, even under appellants' interpretation of Section 10(l), they have not shown how the District Court's exclusion of oral testimony has deprived them of their supposed right to present relevant oral testimony.

ARGUMENT

I. INTRODUCTION: THE STATUTORY SCHEME PURSUANT TO WHICH THE DISTRICT COURT GRANTED RELIEF

Section 10(l) of the Act embodies the determination of Congress that the unfair labor practices made subject to its provisions tend to give rise to such serious and unjustifiable interruptions of commerce as to require their discontinuance, pending adjudication by the Board, to avoid the frustration of the statutory purpose which otherwise would result.[7] The injunctive relief contemplated by

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[7] S. Rep. No. 105, 80th Cong., 1st Sess., pp. 8 and 27.

Section 10(l) is, therefore, interlocutory to the final disposition of the unfair labor practice matter pending before the Board, and is limited to such time as may expire before the Board renders its final decision. See, e.g., Cuneo v. Local 825 International Union of Operating Engineers, 306 F. 2d 394 (C.A. 3); Warehousemen's Union Local 6 v. Hoffman, 302 F. 2d 352 (C.A. 9); Cuneo v. Local 825, International Union of Operating Engineers, 300 F. 2d 832 (C.A. 3); Schauffler v. International Longshoremen's Association, Local 1291, 292 F. 2d 182 (C.A. 3); Madden v. International Hod Carriers', Building and Common Laborers' Union, 277 F. 2d 688 (C.A. 7), cert. den., 364 U.S. 863; Retail, Wholesale and Department Store Union v. Rains, 266 F. 2d 503 (C.A. 5); Madden v. International Organization of Masters, Mates & Pilots, 259 F. 2d 312 (C.A. 7); American Federation of Radio and Television Artists v. Getreu, 258 F. 2d 698 (C.A. 6); Schauffler v. Highway Truck Drivers & Helpers, 230 F. 2d 7 (C.A. 3).

It has long been settled that the issue before a district court in a proceeding under Section 10(l) of the Act is whether there is reasonable cause to believe that the violation of the Act, as charged, has been committed. The district court is not called upon to decide whether, in fact, a violation has occurred; the ultimate determination with respect to this question is reserved exclusively for the Board, subject to review by the courts of appeals pursuant to Section 10(e) and (f) of the Act. As was stated by the Third Circuit in Schauffler v. Local 1291, International Longshoremen's Association, 292 F. 2d at 187-188:

> The Board need not show that an unfair labor practice has been committed, but need only demonstrate that there is reasonable cause to believe that the elements of an unfair labor practice are present. Nor need the Board conclusively show the validity of the propositions of law underlying its charge; it is required to demonstrate merely that the propositions of law which it has applied to the charge are substantial and not frivolous. /Citations omitted./
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> * * * *
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> If, in a Section 10(l) proceeding, a district court or a court of appeals undertook to finally adjudicate such questions it would not be acting consistently with the congressional policy underlying Section 10(l). That Section's usefulness as a tool with which the status quo may be preserved pending final adjudication would be diminished insofar as the Board would be required to finally litigate questions of substance at a preliminary stage. Moreover, the court would not have the benefit of the Board's opinion on questions of fact and novel questions of labor law when making its decision. Thus, the court would, to some extent, usurp the Board's function as the primary fact finder in cases arising under the Act and its function as a primary interpreter of the statutory scheme.

The review of Section 10(l) proceedings in the courts of appeals "is limited to a determination whether the district court's finding that there is reasonable cause to believe that a violation of the Act as charged has been committed is clearly erroneous" (_id._) and "whether the District Court abused its discretion in granting injunctive relief" (_Cuneo_ v. _Local 825, etc._, _supra_, 306 F. 2d at 397).

II. THE DISTRICT COURT PROPERLY FOUND REASONABLE CAUSE TO BELIEVE THAT APPELLANTS VIOLATED SECTION 8(b)(4)(ii)(D) OF THE ACT

It is an unfair labor practice, under Section 8(b)(4)(ii)(D) of the Act for a labor organization or its agents:

> . . . to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is:
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> * * * *

> forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

In the instant case, the affidavits submitted by the parties established that appellant Robert McAlwee, business agent of appellant Electrical Workers, had, on August 13, 1963, at a meeting attended by representatives of McCloskey, Foley-Ernst, and Sheet Metal Workers, said that if Foley-Ernst complied with the decision of the Joint Board, and assigned the disputed work of installing egg crate ceilings to the Sheet Metal Workers, "There would be no Electricians on the job." That a statement of this sort constitutes a threat of the sort made unlawful by Section 8(b)(4)(ii) is too well settled to require discussion. See N.L.R.B. v. United Association of Journeymen, Local 12, 320 F. 2d 250, 253 (C.A. 1); N.L.R.B. v. Local 825, Operating Engineers, 315 F. 2d 695, 697-698 (C.A. 3); N.L.R.B. v. Highway Truckdrivers & Helpers, Local 107, 300 F. 2d 317 (C.A. 3); N.L.R.B. v. Plumbers Union of Nassau County, 299 F. 2d 497, 500 (C.A. 2); N.L.R.B. v. Int'l Hod Carriers, 285 F. 2d 397, 408 (C.A. 8), cert. denied, 366 U.S. 903.

It is equally clear that an object of McAlwee's threat of a work stoppage by electricians was to force or require Foley-Ernst to assign the disputed work to Electrical Workers, rather than Sheet Metal Workers, an object proscribed by subparagraph (D) of Section 8(b)(4). Indeed, it would be difficult to assign any other objective to the statement that "if the work assignment was changed from the

Electricians to the Sheet Metal Workers, . . . there would be no electricians on the job."[8]

Appellants, however, argue that the threat to McCloskey could not have had the object of forcing or requiring Foley-Ernst to assign the disputed work to Electrical Workers rather than Sheet Metal Workers because Foley-Ernst preferred, of its own volition, to assign the work to Electrical Workers. Since Foley-Ernst itself wished to give the work to Electrical Workers, appellants contend that there was no need for Electrical Workers to "force or require" Foley-Ernst to do so, and McAlwee's threat to McCloskey could not have had that objective. The fallacy of this reasoning is obvious. While it is true that Foley-Ernst preferred to assign the disputed work to Electrical Workers, it is equally true that Foley-Ernst was under considerable pressure to take the work away from Electrical Workers and give it to Sheet Metal Workers. Thus, the Joint Board, which exists for the resolution of jurisdictional disputes in the construction industry, had awarded the disputed work to Sheet Metal Workers, and McCloskey, the general contractor, had said that the decision of the Joint Board should be complied with. Under these circumstances, the District Court could reasonably conclude that an object of McAlwee's threat to McCloskey was to make certain that Foley-Ernst did not waver from its stated preference for assigning the disputed work to Electrical Workers, i.e., that an object of the threat was to force or require Foley-Ernst to assign the disputed work to Electrical Workers despite the countervailing pressures stemming from the Joint Board decision and McCloskey's position that Foley-Ernst should comply with that decision.

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[8] While a threat with the object of forcing an assignment to Electrical Workers of the disputed work would not be unlawful if Foley-Ernst were "failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work" (Section 8(b)(4)(D)), appellants do not argue that there was such a controlling Board order or certification.

Appellants' final defense on the merits of the Section 8(b)(4)(ii)(D) violation is that Electrical Workers had a contractual right to the disputed work, and that, under Board doctrine, such a right immunizes conduct otherwise violative of Section 8(b)(4)(D). Assuming, arguendo, that Electrical Workers did have a right to this work under its contract with Foley-Ernst,[9] the contention that this would be a defense to a Section 8(b)(4)(D) violation in the instant case is wholly without merit. The validity of a union's claim to disputed work is relevant as a defense to a Section 8(b)(4)(D) charge only in those cases in which the Board is required to hold a hearing under Section 10(k) of the Act and make an assignment of the work in question as a prerequisite to ruling on the alleged violation of Section 8(b)(4)(D). When, as here, all parties to the dispute have agreed on a method for voluntary adjustment of the dispute, i.e., submission to the Joint Board for settlement, the Board may not conduct a Section 10(k) hearing, its views as to the proper assignment of the work are irrelevant, and no party striking against the Joint Board's decision may defend against a Section 8(b)(4)(D) charge on the ground that it has a valid claim, whether

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9/ Quaere, however, whether the installation of an egg crate ceiling is electrical work (J.A. 12).

contractually or otherwise based, to the disputed work. *Acoustical Contractors Association of Cleveland*, 119 NLRB 1345, 1350-1355; see also *A.W. Lee, Inc.*, 113 NLRB 947, 951-952; *Roy Stone Transfer Corp.*, 99 NLRB 662, 665-666; *Wm. F. Traylor*, 97 NLRB 1003, 1005-1006. In brief, whatever claim a union might have to disputed work apart from the Joint Board ruling is made irrelevant, for Section 8(b)(4)(D) purposes, by submission of the dispute to the Joint Board.[10]

III. THE DISTRICT COURT ACTED WITHIN THE SCOPE OF ITS DISCRETION IN DECIDING THE INSTANT CASE ON THE AFFIDAVITS SUBMITTED BY THE PARTIES

A. Introduction

It is the practice of the Board's Regional Directors, when seeking temporary injunctive relief under Section 10(l) of the Act, to present oral testimony of witnesses in open court, with opportunity for cross-examination, and the introduction of oral testimony by the party against whom the injunction is sought. Indeed, in the instant case, it is undisputed that the Regional Director had witnesses present and prepared to testify at the hearing on the preliminary injunction. There are, however, some district courts in which, because of local practice or the volume of business, motions for preliminary injunctions are heard on affidavits alone. In such courts, the Regional Director will, as he did here, proceed in accord with the wishes of the court. And, while it may be a more satisfactory procedure, where time permits, to decide motions for injunctive relief on the testimony of witnesses in open court, with opportunity for cross-examination, we have no doubt that a court has discretion to decide a motion for injunctive relief under Section 10(l) on the basis of affidavits alone if it considers this course satisfactory.

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[10] Furthermore, even if the Board were called upon to resolve the underlying work-assignment dispute, it would not, contrary to the cases cited by appellants (Brief, p. 19), treat a contractual assignment of the work as dispositive, i.e., as permitting the utilization of pressures otherwise unlawful to obtain that work. While the Board did give such weight to a contractual assignment of work prior to *N.L.R.B.* v. *Radio Engineers (CBS)*, 364 U.S. 573, the clear import of that decision was that the Board, in determining a dispute under Section 10(k), should take into account factors other than a contractual assignment of work. Accordingly, the Board now regards a contractual right to work as merely one factor to be considered in determining whether a union is entitled to work, and, despite Section 8(b)(4)(D), may strike, or threaten a strike, to obtain such work. *Union Carbide Chemical Co.*, 137 NLRB 750, 754; *Matson Navigation Co.*, 140 NLRB 449, 455, n. 6 and accompanying text.

B. Section 10(l) does not require that a party against whom injunctive relief is sought be given an opportunity to present oral testimony

Section 10(l) of the Act, in relevant part, provides that on the filing of a petition for injunctive relief under that section, all persons involved in the charged unfair labor practice "shall be given an opportunity to appear by counsel and present any relevant testimony." It is appellants' contention that the court below, by granting the Regional Director's petition for injunctive relief on the basis of affidavits alone, and by refusing to permit appellants to adduce oral testimony or to cross-examine the Regional Director's witnesses, acted in violation of the quoted language. That contention, however, is without merit.

In the first place, the statute does not, in terms, require that a party against whom injunctive relief is sought be given the opportunity to present "oral testimony," but merely "testimony." The latter, we submit, is a broader term than the former, and is often construed to include written, as well as oral evidence. See 86 C.J.S. Testimony 650-653; II Bouvier's Law Dictionary 3264 (3rd Ed., 1914); Webster's Third New International Dictionary 2362 (1961).

More important, if Congress had intended to impose a requirement that injunctive relief under Section 10(1) be predicated solely on oral testimony given in open court, with an opportunity for cross-examination, and the introduction of oral testimony by the party against whom relief is sought, it knew how to do so. Thus, Section 7 of the Norris-LaGuardia Act (47 Stat. 71, 29 U.S.C. 107) explicitly provides:

> No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute . . . except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) . . . and testimony in opposition thereto. . . . /Emphasis supplied./

Indeed, the Senate had before it, at the time it enacted Section 10(1), a proposal by Senator Ball which would have modified what is now Section 10(1) by, inter alia, making applicable the requirements of Section 7 of Norris-LaGuardia. 93 Cong. Rec. 4887, 5036, 5039, 2 Leg. Hist. 1323-1324, 1348, 1352.[11] Thus, it was stated by Senator Ball that, under his proposal:

> . . . any union against which a charge is made, and against which relief is sought, will have greater protection, will be granted notice and full hearing in open court under our amendment, whereas under the provision now in the committee bill, which wipes out all of the safeguards of the Norris-LaGuardia Act and the Clayton Act, there is no such guaranty of notice and open hearing. So I think we go a little further than the committee bill does. (93 Cong. Rec. 5037, 2 Leg. Hist. 1349)

The following colloquy then ensued (93 Cong. Rec. 5037, 5039, 2 Leg. Hist. 1349, 1353):

> MR. FERGUSON. Is there anything in the pending amendment which would require notice to the other side, and hearing, including the right of cross-examination?

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[11] "Leg. Hist." citations are to the two-volume work Legislative History of the Labor Management Relations Act, 1947 (G.P.O. 1948).

> MR. BALL. I think the Senator was not in the Chamber when I explained that the pending amendment goes much further than the committee bill in safeguarding the right of the parties against whom the injunction is sought. We leave in complete effect section 7 of the Norris-LaGuardia Act, with the exceptions of subsections (c) and (e).
>
> * * * *
>
> MR. FERGUSON. I come back to this proposition: If this amendment is adopted, before an injunction can be obtained by an individual or by a district attorney, will it be necessary that there be a hearing, with the right of cross-examination, and a determination by the court that, under the circumstances of the particular case, an injunction should issue; or can the court grant a temporary restraining order after hearing only the plaintiff?
>
> MR. BALL. The provision in that respect is identical with the provision now in the Norris-LaGuardia Act. It requires notice, public hearing, and cross-examination of witnesses in open court, except that the act now permits a temporary restraining order to be issued for not more than 5 days, on a showing that irreparable injury will occur if such temporary restraining order is not granted.

Following further discussion and debate, the Senate rejected Senator Ball's proposed amendment (93 Cong. Rec. 5058, 2 Leg. Hist. 1370), adopting instead that section of the committee bill (S. 1126, 1 Leg. Hist. 131-132) which was ultimately enacted as Section 10(l) of the Act and which does not require as a prerequisite to the grant of injunctive relief that the court hear "testimony of witnesses in open court," but merely that the party against whom injunctive relief is sought have an opportunity to present "relevant testimony," a provision which, as the court below held, may be satisfied "by affidavit, by deposition, or by witnesses testifying orally" (J.A. 54).[12/]

[12/] The bill passed by Congress in 1947 also continued in effect Section 10(h) of the Act which explicitly makes the Norris-LaGuardia Act inapplicable in proceedings for injunctive relief under the Act.

Furthermore, as the court below also noted, the standard for granting relief under Section 10(l) militates against a requirement that oral testimony be adduced as a prerequisite to the grant of injunctive relief. A district court is not obliged, in ruling on a request for an injunction under Section 10(l), to resolve disputed issues of fact, but merely to determine whether there is reasonable cause to believe that there has been a violation of the Act. Schauffler v. Local 1291, supra, 292 F. 2d at 187-188. This, it is clear, may readily be done on the basis of affidavits. See Federal Trade Commission v. Rhodes Pharmacal Co., 191 F. 2d 744, 747-748 (C.A. 7); Federal Trade Commission v. Thomsen-King & Co., 109 F. 2d 516, 518 (C.A. 7); U.S. v. Wilson Williams, Inc., 277 F. 2d 535 (C.A. 2); Securities and Exchange Commission v. Johns, 207 F. Supp. 566, 573, 574 (D. N.J.); U.S. v. Hughes, 28 F. Supp. 977, 978 (D. E.D. Wash.). And, while there is some authority for the proposition that oral testimony must be admitted to resolve conflicting affidavits when temporary injunctive relief is sought by a private party,[13] such a requirement would be wholly out of place where, as here, the Government is seeking injunctive relief in the public interest and the statutory criterion for the grant of such relief is simply whether reasonable cause has been shown to believe that a violation of the Act has occurred. Federal Trade

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[13] See Sims v. Greene, 161 F. 2d 87 (C.A. 3) (cited at pp. 9-13 of appellants' brief).

Commission v. Rhodes Pharmacal Co., 191 F. 2d 744, 747-748 (C.A. 7).[14]

Nor, contrary to appellants' assertion, does our interpretation of Section 10(1) render meaningless the right of a party against whom injunctive relief is sought to present relevant testimony. Section 10(1) requires the district court to find reasonable cause to believe the Act to have been violated as a condition precedent to granting injunctive relief, and it is not at all inconceivable that affidavit evidence submitted in opposition to the petition for injunctive relief would lead the district court to find an absence of the requisite reasonable cause.[15] Admittedly there will be few instances in which, if the Regional Director has carefully prepared his case, a reasonable factual basis for believing the Act to have been violated will not be found, but that will be the case whether or not oral testimony is required, and is wholly consistent with Congress' intention in enacting Section 10(1) that the Regional

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[14] Indeed, the great weight of authority supports the proposition that even in purely private suits for preliminary injunctive relief, the district court may, in the exercise of its discretion, decline to permit the introduction of oral testimony. Ross-Whitney Corp. v. Smith-Kline & French Lab., 207 F. 2d 190, 197-198 (C.A. 9); Hoffritz v. U.S., 240 F. 2d 109, 111 (C.A. 9); see also Ohio Oil Co. v. Conway, 279 U.S. 813, 814-815; Gibbs v. Buck, 307 U.S. 66, 77-78; Pang-Tsu Mow v. Republic of China, 91 U.S. App. D.C. 324, 328, 201 F. 2d 195, 199, cert. den., 345 U.S. 925. See also 7 Moore, Federal Practice Para. 65-04(3) at 1639-1641 (2d Ed. 1955); 3 Barron & Holtzoff, Federal Practice and Procedure § 1433 at 489 (Rev'd edition 1958).

[15] For example an affidavit by appellant McAlwee that he had been out of the country on the date the Regional Director asserted he threatened McCloskey, coupled with documentary evidence in support of that affidavit, would presumably have precluded the court below from finding that the Regional Director had reasonable cause to believe that the threat had taken place.

Director be able to obtain injunctive relief promptly and easily in cases in which his investigation of a charge alleging a violation of Section 8(b)(4) leads him to believe that a complaint should be issued.[16]

Finally, assuming, arguendo, that a party against whom injunctive relief is sought under Section 10(l) is entitled to present "relevant /oral/ testimony" appellants have wholly failed to show what relevant oral testimony the court below excluded. The Regional Director's affidavits established that McAlwee stated to McCloskey that if the disputed work were assigned to Sheet Metal Workers, there would be no Electricians on the job. McAlwee, in his affidavit, did not deny having made this statement, but merely denied that he made a threat. This presents no factual controversy as to which oral testimony would be relevant, but merely a question as to whether the Regional Director could reasonably infer from this statement (as he did) the threat of a strike of Electrical Workers with the object of forcing Foley-Ernst to assign the disputed work to Electrical Workers. Thus, even assuming that appellants have a statutory right to adduce "relevant /oral/ testimony," the facts as established by the affidavits of appellants and the Regional Director were such that there was no oral testimony (at least none offered by appellants) which could be said to

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16/ Appellants' contention (Br., p. 15) that Section 10(l) must be read to require cross-examination to avoid "substantial constitutional questions" is wholly frivolous. Appellants cite no case, and we are aware of none, holding that the constitution requires cross-examination as a condition precedent to the grant of a preliminary injunction. Appellants have, under the statutory scheme, full opportunity to cross-examine Government witnesses as well as to introduce oral testimony of their own in those proceedings which lead, if a violation of the Act is found, to the issuance of a permanent injunction. Cf. Louisiana v. N.A.A.C.P., 366 U.S. 293, 297-298 (Frankfurter, J., concurring).

be relevant to the question before the District Court, i.e., whether there existed reasonable cause to believe that McAlwee had threatened McCloskey with an object interdicted by Section 8(b)(4)(D). Thus, even under appellants' interpretation of Section 10(1), they have not shown any deprivation of their asserted right to present relevant oral testimony.[17]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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March 1964.

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[17] The statement in Penello v. Local Union No. 59, Sheet Metal Workers International Association, 195 F. Supp. 458 (D.C. Del.), quoted by appellants at p. 13 of their brief, that there is an absolute right to present oral testimony in proceedings under Section 10(1) is sheer dictum as that case was tried on the basis of oral testimony. Furthermore, this statement was unaccompanied by any citation of case law or legislative history.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, _et_ _seq_.) are as follows:

SEC. 10.

* * * *

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U.S.C., Supp. VII, title 29, secs. 101-115).

* * * *

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

REPLY BRIEF FOR APPELLANTS

IN THE

United States Court of Appeals

For the District of Columbia Circuit

No. 18,263

Electrical Workers Local 26, International Brotherhood of Electrical Workers, AFL-CIO, and its Business Agent Robert McAlwee, *Appellants*,

v.

John A. Penello, Regional Director of the Fifth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, *Appellee*

On Appeal from the United States District Court for the District of Columbia

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REPLY BRIEF FOR APPELLANTS

I. The District Court's Refusal to Allow Cross-Examination or Oral Testimony Was Erroneous

The Board, in its brief to this Court, as it did below, makes clear that it prefers to present oral testimony with the opportunity for cross-examination in Section 10(1) proceedings and that this is the general practice. Appellee's Brief p. 9, 17. Moreover, the Board candidly admits that this is "a more satisfactory procedure." Appellee's Brief p. 18. However, the Board argues that a district court has discretion to proceed by affidavits alone. Even if Section 10(1) permitted the District Court such discretion, and it does not, that discretion was not exercised in this case. Rather, Judge Holtzoff stated flatly that he decides all motions for preliminary injunctions on affidavits. J.A. 32. The District Court made no preliminary inquiry as to whether there were any factual controversies before deciding to proceed by affidavit. J.A. 32. Indeed, the Board's admitted preference for testimony in open court is persuasive evidence (if any were needed in light of the clear statutory requirement) that Section 10(1) injunctions should be issued only after the parties have been permitted to present witnesses and to cross-examine.

In our original brief, appellants relied upon a number of cases including *Ensign* v. *Pennsylvania,* 227 U.S. 597, in which the courts have held that the word "testimony" "more properly refers to oral evidence." The Board makes no atempt to deal with these cases which demonstrate that the words "relevant testimony" in Section 10(1) clearly require oral evidence and cross-examination, but, instead, relies upon the supposed Congressional rejection in adopting Section 10(1) of the procedural requirements of Norris-LaGuardia. Appellee's Brief p. 10. The Ball amendment, to which the Board refers, was intended to give private parties the right to bring suit for secondary boycott violations directly and was defeated for that reason. 93 Cong. Rec. 5038, 5039, 5040, 5041, 2 *Leg. Hist.* 1350, 1352, 1353, 1354, 1356, 1357.[1] The

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[1] Thus, Senator Ball stated, 2 *Leg. Hist.* 1350, "I have said that the pending amendment would simply give to those employees and to their employers the right to go directly into court to protect their right to freedom from this kind of racketeering pressure, whereas the committee bill routes them through a bureaucracy, and that bureaucracy possesses the right to say whether the court shall finally pass upon the merits of the case." 1352, "All I am objecting to in the committee bill, and all that I propose to change, is the requirement in the committee bill that before the court is permitted to pass on such questions and to protect the rights of employers and employees injured by such racketeering practices, the National Labor Relations Board shall first screen the charges, before the courts are permitted to pass on them. 1353, "That is my main reason for offering this amendment, namely, to take away the placing of a bureaucracy of government—an administrative board, if you please—between the injured citizen and his right to go into court and protect his rights under the law."

Senate debates reveal that the rejection of the Ball amendment was in no sense Congressional rejection of the procedural requirements of Norris-LaGuardia, but rather a refusal to restore to the district courts the power to proceed on complaints of private parties.

In fact, Senator Ball's assertion, Appellee's Brief p. 19, in attacking the bill that became Section 10(1), that "there is no such guaranty of notice and open hearing," is clearly inaccurate. Contrary to Senator Ball, Section 10(1) expressly provides that: "Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony * * *." The obvious inaccuracy of Senator Ball's statement regarding the bill attests yet once again to the wisdom of the familiar principle that courts in construing legislation should not rely upon the statements of opponents to the measure. *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 394 ("... fears and doubts of the opposition are no authoritative guide to the construction of legislation."); *Mastro Plastics* v. *Labor Board,* 350 U. S. 270, 288, n. 22; *United States* v. *Calamaro,* 354 U.S. 351, 357-358, n. 9.

Before answering the Board's other contentions, we must note that the Board's analysis is confused by its inability to describe the standard to be applied by the District Court before issuing the requested injunction. Judge Holtzoff declared the standard to be whether the *Regional Director* had reasonable ground to believe that the charge was true. J.A. 53. The Board's brief here adopts that standard on a number of occasions. Appellee's Brief pp. 11, 22-n. 15, 23. At other points, the Board declares the standard to be whether the *District Court* had reasonable cause to believe a violation had occurred. Appellee's Brief, pp. 21, 24. In fact, the statute declares that the District Court must find that the injunction would be "just and proper." That standard requires the District Court to find some factual and legal support for every element of his case. See *Hecht* v. *Bowles,* 321 U.S. 321,[2] and cases cited at Appellants' Brief pp. 11-12. That the District Court must undertake such an investigation is clear from the statutory provision that the opposing party be given the right to present "relevant testimony."

The Board has not answered appellants' contention that unless the right to present "relevant testimony" permits the opposing party to offer witnesses and to cross-examine, the statutory provision is meaningless. Appellee's attempt to find some other intelligible meaning for the statutory language is demonstrably unsuccessful. Thus, the Board argues that "it is not at all inconceivable" that the District Court could find an absence of reasonable cause solely on affidavits and offers a strained and absurd hypothetical that "presumably" would have precluded the court below from granting the injunction. See Appellee's Brief p. 22. We disagree. Affidavits alone would not preclude an injunction even in the unrealistic situation posed by the Board. More important, Congress cannot be said to have spelled out the rights of the opposing party to include the right to present "relevant testimony" solely for so ridiculous an eventuality. Even ingenious appellate counsel cannot construct a realistic situation in which factual controversies can be resolved by affidavit. The Board's glib assertions cannot imbue the statutory provision with any intelligible purpose where "relevant testimony" is restricted to affidavits. We reiterate, the right to present "relevant testimony" is meaningless unless the opposing party is thereby permitted to present witnesses and to cross-examine.[3]

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[2] The Supreme Court construing a statute dealing with the exigencies of war time, said that Section 205 (a) "falls short of making mandatory the issuance of an injunction merely because the Admintrator asks it". The rule of construction applied by the Court was "We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made."

Lastly, the Board argues that appellants were not prejudiced by the lack of any opportunity to present witnesses or to cross-examine. The Board blandly asserts that there is "no factual controversy as to which oral testimony would be relevant, but merely a question as to whether the Regional Director could reasonably infer from this statement (as he did) the threat of a strike of Electrical Workers with the object of forcing Foley-Ernst to assign the disputed work to Electrical Workers." Appellee's Brief p. 22. The District Court recognized that there was a factual conflict. J.A. 52, 53. There were serious questions as to whether a threat had been made and whether that threat had an illegal object. The Board itself, in two recent cases very similar factually to this case, has declared that there was no reasonable cause to believe that a threat with an illegal object had been made. *International Association of Machinists (Carling Brewing Co.)*, 136 NLRB 1219; *B. P. John Furniture Co.*, 144 NLRB No. 60, 54 LRRM 1090. Indeed, appellee's own analysis of the alleged illegal object, Appellee's Brief p. 15, makes clear that critical factual issues are present. See pp. 6-7, *infra*.

Moreover, the Board totally ignores the critical requirement that testimony to be credible must be tested by cross-examination. Thus, in *Greene* v. *McElroy*, 360 U.S. 474, 497, the Supreme Court endorsed Professor Wigmore's analysis of the importance of cross-examination:

> For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for

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[3] The Board's assertion that a requirement for oral testimony is inapposite where the "Government is seeking injunctive relief" ignores the statutory requirement in Section 10(l) that the opposing party be granted the right to present "relevant testimony." Moreover, the fact that the "Government" rather than a private party hopes to avoid cross-examination of its witnesses does not render the proffered affidavits any more credible.

> testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.

Here, the District Court made detailed findings on the basis of untested affidavits. The denial of the opportunity to test that evidence by cross-examination cannot be overcome, as the Board suggests, merely by accepting everything in the affidavits as true and drawing tenuous inferences from this "evidence."

II. The Regional Director Did Not and Could Not Offer Any Proof of an Illegal Object

The Board fails to answer Appellants' contention, Appellants' Brief, pp. 16-18, that there was no proof of an object condemned by the Act and that the District Court failed to make any finding on this critical issue. Instead, the Board now hypothesizes, for the first time and without citation to the record, that "Foley-Ernst was under considerable pressure to take the work away from Electrical Workers," Appellee's Brief p. 15, and that appellants' object was to make certain that "Foley-Ernst did not waver from its stated preference for assigning the disputed work to Electrical Workers . . . . ." Appellee's Brief p. 16. This Court cannot accept appellate counsel's present unsubstantiated hypothesis as a substitute for record evidence. Moreover, the District Court's analysis of Foley-Ernst's position renders this new notion untenable. Thus, the District Court found that "none [no threat] appears to have been necessary because Foley-Ernst, the subcontractor, has indicated not only a desire but an intention to disregard the decision of the National Joint Board and to continue employing electricians for this particular task." J.A. 52. The Board's new theory, totally unsupported by the record or by the District Court's findings, cannot serve to cure the failure of the District Court to find the requisite illegal object.

Moreover, this new formulation as to the Union's intention is itself totally unrealistic and does not prove any illegal object within Section 8(b)(4)(D). The District Court found a threat to McCloskey, not to Foley-Ernst. If Local 26 was concerned lest Foley-Ernst waver, it would threaten Foly-Ernst not McCloskey, yet the District Court found such a threat unnecessary. The critical object finding cannot be supplied by the "unrealistic" theory now advanced by the Board. See *Retail Clerk's Union Local 770* v. *NLRB,* 296 F. 2d 388, 372 (1961) 111 App. D.C. 246. Neither on the record below, nor under the theory now advanced for the first time on appeal, has the Board proved an illegal object within the meaning of Section 8(b) (4) (D).

III. The Board's Argument That the NABET Doctrine Does Not Apply Is Unsupportable

The Board argues that the alleged threat was not protected by the *NABET* doctrine, see Appellee's Brief p. 16, since,

> "The validity of a union's claim to disputed work is relevant as a defense to a Section 8(b) (4) (D) charge only in those cases in which the Board is required to hold a hearing under Section 10(k) of the Act and make an assignment of the work in question as a prerequisite to ruling on the alleged violation of Section 8(b) (4) (D).

No authority is cited for this novel proposition that so clearly contradicts the express language of the Supreme Court in *Labor Board* v. *Radio Engineers (CBS),* 364 U.S. 573, 577, n. 12—". . . the Board has adopted the position that jurisdictional strikes in support of contract rights do not constitute violations of § 8(b) (4) (D) despite the fact that the language of the section contains no provision for special treatment of such strikes."

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